Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

JAMES J. HAYES,

Petitioner,

VS.

NICE SYSTEMS LTD., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Introductory Statement

Historically securities class action litigation has been driven by entrepreneurial lawyers who both initiate and control class litigation. Practitioners follow a sue and settle business model. A precipitous drop in the market price of a stock accompanied by high trading volume identifies a target company. The financial incentives for both the company and the class lawyer are to quickly settle for a fraction of potential damages. Legal or economic merit is of little importance. The company avoids potentially huge damages that exceed insur-ance coverage. The class lawyer receives court awarded attorney fees, typically for one-third of the settlement for doing little work at minimum risk. (Cf. App. G & H, A-39, 46.)

A 1993 Forbes profile of William Lerach characterizes the lawyer's role.

> Though ostensibly an attorney for named plaintiffs, Lerach is not really accountable to them, instead pretty much deciding on his own whom to sue and when to settle and for how much. "I have the greatest practice of law in the world. I have no clients." Forbes, Oct. 11, 1993 p. 52.

Congressional testimony amplified Lerach's explanation. *"I hire the plaintiff. I do not have some client telling me what to do. I decide what to do."* 141 Cong. Rec. 192, S17956-57.

Such abuses prompted Congressional action. In 1995, the Private Securities Litigation Reform Act (PSLRA) heightened pleading requirements and empowered shareholders by providing the opportunity to find the most capable shareholders for lead plaintiff who would control the litigation by

selecting lead counsel and monitoring case developments. PSLRA also empowered shareholders by requiring that settlement disclosures include information on damages, attorney fees and recoveries on a per share basis. This information would enable shareholders to evaluate the settlement and to oppose those viewed as unfair.

PSLRA's effect – perhaps due to the ability of class lawyers to avoid the law's provisions as shown in the Questions (p. iv) is unclear. Forbes in a February 2004 article notes that: *"Republicans in Congress want to enact a Class Action Fairness Act that would...rein in lawyers' fees."* Forbes, Feb 16, 2004, p. 90.

The emerging accounting fraud scandals has exposed another fallacy of the current practice of securities class action litigation. Class lawyers had long argued that their law suits help keep business honest. But investors' confidence has been shaken by the unprecedented level of accounting fraud by some of the largest corporations including Enron, WorldCom, and Tyco. Having lost billions of dollars in market value, investors rightly wonder whether buying stock in even blue chip U.S. companies is investing or casino gambling.

Both Congress and the President have worked to restore investor confidence. The President has established a Special Task Force in the Justice Department to pursue criminal prosecutions. Congress has passed Sarbanes/Oxley, which provides new accounting reforms that include a requirement for the chief executive and financial officer to certify their company's financial statements. Investor confidence has improved along with market averages.

Investors are now seeking to recover their fraud damages through class action litigation. On May 11, 2004, Citigroup

announced, that it will pay $2.65 billion to settle its role in the WorldCom fraud. The Questions (p. iv) raised by the NICE settlement approval offer this Court the opportunity to provide timely guidance to enable the district courts to fairly adjudicate nationally important settlements emerging from the recent accounting scandals. Just as concerted criminal prosecution has contributed to improved investor confidence, the full, or at least a fair, recovery of fraud damages in class actions is also needed to sustain and improve investor confidence. A recent letter to the readers of the Wall Street Journal provides an investor's perspective:

> Many people won't be coming back to the market under any circumstance. After being poorly advised, lied to, manipulated, misled, cheated and betrayed, what can you expect? Once burned, they are twice shy. Most people were not "professional market players," but were simply investors who wanted to support sound businesses and earn a reasonable return on the investment of their pensions and life savings. When such trust and reasonable expectations are breached, it takes a lot more than hearty reassurances to restore their confidence, no matter how heavily the recovery is touted.
>
> Fred Gibson
> Tahlequah, OK

Wall Street Journal, April 12, 2004, p. A19.

Questions

a) Can a district court's fairness evaluation of a securities class action settlement proposal rely on estimates of aggregate damages calculated by using the proportionate trading model?

b) Does a securities class action settlement based on aggregate damages create a conflict of interest between class counsel and the absent class that would violate the adequacy of representation requirements of Rule 23(a)(4) of the Rules of Civil Procedure?

c) Can a district court's fairness evaluation of a fraud-on-the-market securities class action settlement proposal rely on estimates of actual damages calculated by taking the difference in an average of closing securities prices several days before and after the announcement of the discovery of a fraud or must actual damages be determined by the price drop of a security in a liquid market responding quickly to news when the truth appears?

d) Can a district court's initial presumption of fairness before notice of the settlement to the class be maintained in considering final settlement approval?

e) Can a district court ignore evidence introduced in a Rule 60 motion that a settlement class approved by the court was not certifiable under Rule 23?

f) Can a circuit court consolidate an appeal of a district court's denial of a Rule 60 motion for reconsideration and uphold the district court's denial of that motion without hearing the issues and arguments supporting reconsideration or is this procedure a denial of due process?

PARTIES TO THE PROCEEDINGS

The petitioner James J. Hayes is a member of the settlement class. Mr. Hayes objected to the settlement and provided the district court written analysis and oral argument in support of settlement disapproval. He appealed the district court approval of the settlement to the Third Circuit Court of Appeals.

The respondents are the defendants; NICE Systems Ltd., NICE Systems, Inc., the following officers and directors; Lauri A. Hanover, Daphna Kedmi, Avraham Lazar, Benjamin Levin, Haim Shani and Yuval Yania and the lead plaintiffs for the class of shareholders victimized by NICE's accounting fraud; Adrian Byrne, Dresdnerbank Investment Management, E.H. Tepe Co., Inc. and Afikim Management.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

No. _____

James J. Hayes,

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NICE SYSTEMS LTD., et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, James J. Hayes on behalf of himself and members of the settlement class respectfully petitions for a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's approval of the settlement (App. A, A-1) is unreported. The district court opinion approving the settlement (App. B, A-8) is an unreported bench opinion. The district court order denying the Rule 60(b)(2) motion for reconsideration (App. C, A-34) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2004. A petition for rehearing was denied on March 19, 2004 (App. E, A-36). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

No statutes as such are involved. However the Private Securities Litigation Reform Act, 15 U.S.C. 78u-3(B) and 7, are applicable to the appointment of lead plaintiffs and the class notice explaining the settlement. Rule 23(a) of the Federal Rules of Civil Procedure is applicable to certification of the suit as a class action.

STATEMENT OF THE CASE

This is an appeal of the Third Circuit's upholding of the District Court of New Jersey's approval of a class action settlement of a fraud on the market suit against NICE Systems, Ltd. The company's audited financial statements for 1999 and it's publicly reported quarterly earnings released following each of the first three quarters of 2000 significantly overstated earnings. On February 8, 2001, NICE announced that it had overstated its sales by $6.2 million in 1999 and $9.0 million in the first three quarters of 2000 and that additional time would be needed to calculate the corrected earnings. (In 1999, the restated earnings were $.30 per share less than the reported earnings. For 2000, the restated earnings were $.50 per share less, about 64% of those publicly reported.) Immediately following the announcement, NICE's American Depository Shares ("ADSs") fell sharply, closing $5.19 lower than the previous day's close on extremely active trading. Shortly thereafter, fifteen class action suits were filed.

The shareholders' complaints asserted that as a result of NICE's accounting violations, the company's reported results of operations were materially overstated, and that the price of NICE ADSs were artificially inflated. In addition, Shinnecock Capital (case number 01-CV-0792) alleged that that NICE had made statements and financial projections which masked the difficulties it was having integrating a new acquisition and in closing sales. These difficulties were brought to the investing public's attention on December 28, 2000 when NICE announced lower than expected sales and a significant decline in earnings for the fourth quarter ending on December 31, 2000 rather than the higher comparable quarterly earnings the company had reported for the previous two years. Immediately following this announcement, NICE's ADSs fell sharply closing $27.50 lower than the previous day's close on extremely active trading.

Class Action Litigation Under PSLRA

The NICE class actions fall under the purview of the Private Securities Litigation Reform Act of 1995 (PSLRA). This law sought to improve the practice of class action securities litigation in part by empowering shareholders. (Cf. p. i, n.1) Pursuant to notice required by PSLRA, Adrian Byrne, Dresdnerbank Investment Management, Afkim Management and E. H. Tepe members of the purported class, sought appointment as lead plaintiffs. NICE and Adam [sic] Byrne and Dresdnerbank moved the district court to consolidate cases. On May 21, 2001, the district court — without the benefit of a hearing and based on the Declaration of Gary S. Graifman — signed Graifman's proposed order consolidating the fifteen actions and appointing the aforementioned shareholders as lead plaintiffs. Three law firms were appointed as lead counsel and Graifman's law firm was appointed Liaison Counsel.

The PSLRA, 15 U.S.C. 78u4(3)(B)(ii) requires that the consolidation issue be decided before the appointment of the lead plaintiff. Without the benefit of a consolidated complaint, a district court could not make the investigations required by Rule 23 of the Federal Rules of Civil Procedure (Rule 23) to determine whether the claims of the proposed lead plaintiffs are typical of the claims of the proposed class and whether the proposed lead plaintiffs could fairly and adequately represent and protect the interests of the class. PSLRA also requires that the lead plaintiff(s) be the class member(s) that the court determines to be the most capable of adequately representing the interests of the class. In NICE, the Consolidated Amended Class Action Complaint was filed on August 20, 2001, three months after the appointment of lead plaintiffs!

A motion to dismiss was filed on December 27, 2001. Several months after the motion to dismiss was fully briefed but before the oral argument, the District Court issued an order dismissing the case as settled on September 9, 2002. The settlement was subject to plaintiffs' conducting due diligence discovery that included analysis of board minutes, reports of NICE's independent internal controls auditor and deposing of NICE's new Chief Financial Officer. In this investigation, the plaintiffs learned that both NICE's outside and internal controls auditors discovered the bogus sales in September 2000 and reported their findings to the Board of Directors in October 2000. Nevertheless, the plaintiffs concluded that the defendants did not know the true scope of the bogus sales issue that would have triggered a duty to include this information in their December 28, 2000 announcement of the earnings disappointment that caused NICE's ADSs to drop by $27.50. Consequently, the $10 million settlement gave no weight to the $27.50 per ADS decline.

On December 11, 2002, the district court preliminarily approved the settlement and conditionally certified a settlement class that consisted of: *"All persons who purchased or otherwise acquired Nice ADSs during the period from November 3, 1999 to February 7, 2001, inclusive, other than Defendants."* Without the benefit of a hearing, the district court found that the claims of the lead plaintiffs were typical of the claims of the class and that the lead plaintiffs and their counsel fairly and adequately represented and protected the interests of the class. The Settlement Order also provided for a settlement hearing and the district court approved the proposed notice to class members. The proposed notice included the statement that attorney fees and costs were approximately $0.73 on an average per ADS basis.

Settlement Notice Proscribed by PSLRA

Class counsel prepared and authorized the distribution of a combined notice of the proposed class action with its proposed settlement. (Notice) The empowering shareholder provisions of the PSLRA required that the settlement notice contain: (A) Statement of plaintiff recovery, (B) Statement of potential outcome of case, (C) Statement of attorney's fees or costs sought, (D) Identification of lawyers' representatives, (E) Reasons for the settlement and (F) Other Information along with a cover page summarizing the information contained in such statements. The PSLRA further requires the statement on attorney fees and costs to include these charges on an average per share basis with a brief explanation supporting the fees and costs sought. It reiterated that the information on attorney fees must be *"clearly summarized on the cover page of any notice of settlement...disseminated to the class."* 15 U.S.C. 78u4(7)(C).

The Notice apprised class members of a $10 million cash settlement, a request for a attorney fees not to exceed 30% of

the settlement fund and costs not to exceed $250,000, a complex allocation plan that excluded allocations to shareholders selling after December 28, 2001, and a settlement hearing (Hearing) where class members could object to the settlement, attorney fees, and plan of allocation. The Notice did not inform class members on the amount of damages noting only that the parties disagreed on the amount that NICE ADSs were allegedly artificially inflated during the class period. The Notice informed class members that based on the lead plaintiffs' estimate (based on a number of assumptions many undisclosed) that the settlement would equate to $2.24 per share before deduction of court approved fees and expenses. It informed class members that attorneys' fees and costs were $0.073 per share based on estimates of lead plaintiffs' counsel. The cover page summary included only the $10 million cash settlement proposal. It did not contain any information on attorneys' fees or costs as required by PSLRA.

The Hearing and Settlement Approval

The District Court presided at the Hearing to determine whether the proposed settlement was fair, reasonable and adequate, and in the best interests of the class; whether the proposed plan of allocation should be approved; and the fee and expense requests submitted by the class attorneys. The District Court heard the two class members who filed written objections. Objector Hayes argued that the Notice was inadequate because the amount shown for attorney fees and costs was $0.729 per ADS not the $0.073 shown in the Notice. He also argued that the proposed settlement was inadequate and that the court could not rely on the aggregate damage estimates that the lead plaintiffs were using to justify the settlement. Counsel representing objector Weiderman argued that there was insufficient information in the Notice concerning damages, that the parties did not negotiate in good faith and the requested attorney fees were excessive.

Despite the objections, the District Court issued a bench opinion that found that the settlement was fair, that the erroneous statement on attorney fees was a typographical error[1] and the Notice complied with the requirements of PSLRA in all respects, including the statement as to damages, and that 30 per cent was a fair and reasonable attorney fee. The District Court's opinion noted that objector Weiderman withdrew his objection on the conduct of counsel in not engaging in a fair negotiating process. The District Court opinion relied on the plaintiffs and defendants arguments that the settlement satisfied the nine guidelines that the Third Circuit required district courts to consider in deciding fairness. Girsh v. Jepson, 521 F. 2d 153, 157.

Request for Reconsideration and Third Circuit Appeals

Objector Hayes appealed[2] the approval of the settlement and then requested the district court reconsider its decision after the claims administrator's preliminary report was filed. The Motion for Reconsideration was based on Rule 60 (b) (2) of the Federal Rules of Civil Procedure which provides reconsideration on the basis of new evidence that could not have been discovered before the Hearing. Tabulation of the individual claims summaries provided in the report showed that about 38 percent of the claims filed were denied participation in the settlement fund because they did not hold NICE ADSs on February 8, 2001 as provided in the Plan of Alloca-

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[1] It is not clear that the misstatement of attorney fees in the December 17, 2002 dated Notice was a typographical error. The attorney fees were correctly stated in the Notice approved by the district court on December 11, 2002.

[2] The Plaintiffs and defendants counsel requested a $15,000 appeal bond. After argument the District Court approved a $10,000 bond. Hayes requested that the bond be reduced on the basis this amount was excessive. The assessed costs allowed by the Third Circuit totaled $753.87.

tion section of the Notice. The new information was evidence that the settlement class had been improperly certified as it showed that the class claims did not satisfy the commonality requirements of Rule 23(a)(2) of the Federal Rules of Civil Procedure. The claims report also showed that two of the lead plaintiffs, Dresdnerbank Investment Management and E. H. Tepe Co. did not file claims and on this basis would not be qualified as lead plaintiffs both under PSLRA (15 U.S.C. & 78u-4(3)(B)) and Rule 23(a)(3). Finally, class counsel did not represent the interests of class members, possibly including all the lead plaintiffs, who had a claim based on NICE's December 28, 2000 announcement as required by Rule 23(a)(4).[3] The district court denied the Motion for Reconsideration finding that there was no new information and that the allocation plan was fully disclosed in the Notice. On September 17, 2003, objector Hayes filed a second appeal with the Third Circuit.

In a letter dated September 19, 2003, the Plaintiffs/Appellees requested an appeals conference proposing that the second appeal be dismissed or alternatively, the briefing should be expedited so that the second appeal could be heard with the initial appeal. Briefing on the first appeal was completed on September 29, 2003. By order of the Clerk entered November 5, 2003, the Appellees' letter was construed as a motion and was sent to the merits panel. The

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[3] When class counsel decided that there was not sufficient evidence to support a December 28 claim, they should have amended the class definition to include only shareholders holding NICE ADSs on February 8, 2001, amended the Consolidation Order to include only those cases asserting February 8, 2001 claims and replaced the lead plaintiffs with those who only had claims associated with NICE's February 8, 2001 announcement as required by state bar ethics codes and Rule 23(C)(1).

parties were advised that no briefing schedule would be issued in the second appeal pending disposition of Appellees' motion by the merits panel.

The Third Circuit affirmed the judgment of the district court approving the settlement on February 9, 2004. The Third Circuit also granted Appellees' motion to expedite the second appeal which it construed as a motion to consolidate the appeals. Then without knowing Hayes' arguments in the second appeal, the Third Circuit found that the district court did not abuse its discretion in denying Hayes's Rule 60(b) motion. In a letter to the parties dated February 19, 2004 the Legal Division of the Clerks office acknowledged that they would not issue a briefing schedule in the second appeal. Hayes filed a request for En Banc and Panel reviews. (App. F, A-32).

Request For En Banc and Panel Rehearing

The Request for En Banc Rehearing contended that the District Court's:

- settlement class certification order is contrary to Supreme Court precedent in General Telephone of Southwest v. Falcon, 457 U.S. 147 and Third Circuit precedent In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liability Litig., 55 F. 3rd 768. (GMTrucks);
- it's incomplete fairness assessment is contrary to findings required by the Third Circuit in Girsh v. Jepson, 521 F. 2d 157;
- it's assessment of the risks of establishing liability are inconsistent with In Re Cendant Corp. Litigation, 264 F. 3rd and In Re Cendant Corp. Securities Litigation, 109 F. Supp. 2d. 285;
- it's presumption of settlement fairness is a misapplication of the findings of GM Trucks and Cendant;

- it's reliance on average market prices in assessing damages is contrary to findings in Basic Inc., v. Levinson, 485 U.S. 224 and Goldberg v. Household Bank, F.S.B., 890 F. 2d 965; and
- the scientific reliability of the aggregate damages underlying the court's fairness opinion does not meet this Court's guidelines articulated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579.

The Request for Panel Review contented that the Panel;

- overlooked the class certification issues revealed in the Claims Administrator's Report and
- the issue of high attorney fee award is appropriate for Panel review.

REASONS FOR GRANTING WRIT

In Girsh v. Jepson, 521 F. 2nd 153, the Third Circuit established guidelines for district courts to use in evaluating settlements for fairness in compensating shareholders for their fraud damages. (App. A, A-4) The guidelines include a requirement that the district court evaluate fairness by comparing the settlement with the amount of damages that could be awarded in a trial. In addition, the Private Securities Reform Litigation Act (PSLRA) provides that class members be informed on a per share basis the damages available at trial, the per share recoveries (before deduction of attorney fees) and the attorney fees. With this information, shareholders could evaluate the settlement for themselves and object to settlements that they perceived as unfair.

The NICE parties avoided the required PSLRA damage disclosures by maintaining that the lead plaintiffs and defendants did not agree on the average amount of damage per ADS that would be awarded if plaintiffs prevailed at trial. The Plan of Allocation, however, provided a $3.50 per ADS

cap that plaintiffs claimed would be the *"maximum amount per ADS that would likely been recovered at trial."*[4] At the Hearing, class counsel multiplied this number by lead plaintiffs' estimate, based on the proportionate trading model, of the number of damaged shares to obtain the amount of aggregate damages that were compared to the settlement and evaluated for fairness.[5]

The problem is that the aggregate damage methodology is inaccurate and any conclusions on the settlement's fairness based on aggregate damages in this case and all other securities fraud settlements are meaningless.[6] With the information provided neither the District Court nor the class members could reach a reasoned opinion on the fairness of the proposed settlement!

[4] This estimate is based on an average of market prices five days before and after NICE's announcement of the fraudulent accounting. The plaintiffs provided no justification or criteria for the length of the period. The table below shows that $3.50 per ADS is the minimum (not the maximum asserted by plaintiffs) amount of damages based on averages up to ten days.

Period	Damages	Period	Damages
Announcement	$5.19	6 day av.	$3.88
2 day av.	$4.50	7 day av.	$4.27
3 day av.	$4.05	8 day av.	$4.90
4 day av.	$3.77	9 day av.	$5.66
5 day av.	$3.47	10 day av.	$6.56

The above data shows that plaintiffs minimized damages to put the settlement in a more favorable light.

[5] This convoluted process could be avoided if settlements were made on a per share basis.

[6] This methodology is analogous to measuring the length of a line with one inch pieces of rubber. The length of the line depends on how much the rubber is stretched, which is unknown. The measurements are thus meaningless. Comparing measurements of lines measured by other individuals who stretch the one inch rubber lengths differently only adds to the unknown error. This analogy shows why assessing the fairness of securities class action settlements using aggregate damages is totally unsatisfactory and has been barred by Supreme Court guidelines.

With an historic number of large accounting fraud cases moving through the courts, it is in the nation's economic interest that this Court hear this appeal and then require the use of accurate data in evaluating the fairness of securities class action fraud settlements.

Aggregate Damages Barred
In Securities Class Action Settlements

Supreme Court Guidelines for Expert Testimony Bars Aggregate Damages

The Third Circuit opinion and the District Court's fairness determinations rely on the aggregate damage calculations by plaintiffs' damage expert. The aggregate damages rely on an estimate of the number of damaged ADSs based on a proportionate trading model. A district court in Illinois has recently determined that the proportionate trading model did not meet this Court's guidelines for scientific reliability and barred expert testimony based on that model. Quoting the district court: *"The proportionate trading model does not meet any of the Daubert standards."* Kaufman, et. al. v. Motorola, Inc. (2000 W.L. 1506892 (N.D. Ill.))

These Supreme Court guidelines reflect an effort to eliminate junk science from the judicial process:

> Additionally, in the case of a particular scientific technique the Court ordinarily should consider the known or potential rate of error.
>
> The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity - and thus the evidentiary relevance

and reliability - of the principles that underlie a proposed submission. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. at 594 (1993)

Kaufman provided the first standards based test of the proportionate trading model. Testimony by both Dr. Jarrell, the damage expert who applied the model, and the defendant's expert, Dr. Stillman, agreed that the model did not meet any of the four Daubert standards. The district court found that the model had never been tested for reliability, the first Daubert standard and it had never been accepted by professional economists, the fourth Daubert standard. Dr. Jarrell testified that there was no way to actually test the models reliability.

The Third Circuit opinion and the District Court conclusion on the fairness of the settlement rely on aggregate damage calculations based on the proportionate trading model. (App. A, A-6 & App. B, A-27) Using aggregate damages to compare to the settlement to assess its fairness are barred by the Kaufman application of Daubert. The aggregate damage methodology is inaccurate and conclusions on settlement fairness based on aggregate damages are meaningless. The Third Circuit opinion that aggregate damage estimates are only barred in establishing damages at trial but not in evaluating settlements is a misperception that requires a ruling by this court.

Rule 23's Adequacy of Representation Requirements Bar Settlements Based on Aggregate Damages

In addition to being impossible to evaluate for fairness,

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[7] Fixed settlements refer to lump-sum settlements that offer a fixed amount of money regardless of the number of defrauded shares. The alternative per share settlement would offer a fixed amount per share to for every valid claim.

fixed settlements[7] in fraud-on-the-market cases - create conflicts of interest between class counsel and the class. Judge Becker noted that *"Economic models have shown how conventional methods of calculating class action fee awards give class counsel incentives to act earlier than their clients would deem optimal."* In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liability Litig., 55 F. 3rd 768 802 (3rd Cir. 1995)

Fixed settlements align the interests of class counsel more closely with the defendant by offering class counsel substantial and guaranteed fees for little work in exchange for providing the defendant a lengthy class period and an expansive release which protects the defendant from other potential claims. Fixed settlements are easily manipulated by class counsel to provide the defendant "litigation insurance." Fixed settlements incents both class counsel and the defendant to accommodate each others interests to the detriment of class interests.

Leading commentators have long recognized the endemic nature of collusive settlements in class actions. *"Ultimately the most persuasive account of why class actions frequently produce unsatisfactory results is the hypothesis that such actions are uniquely vulnerable to collusive settlements that benefit plaintiff's attorneys rather than their clients."* John C. Coffee, Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working, 42 MD. L. Rev. 215 (1983)

Courts have recognized that pre-certification settlements make it difficult to detect collusion and consequently have required the vigorous application of Rule 23 as an essential element of the district court's fairness evaluation.

In short, the prophylactic devices used by judges to

> approve these pre-certification settlements without ever formally certifying the class fail to satisfy the requirements of Rule 23. Without determining that the class claims are common and typical of the entire putative class and that the class representatives and their counsel are adequate representatives, we have no assurance that the district court fully appreciated the scope and nature of the interests at stake. GM Trucks, 55 F. 3rd at 797.

A better approach would be for this Court to recognize that in addition to being impossible for courts to evaluate; fixed settlements based on aggregate damages also create conflicts for class counsel that make it impossible for courts to certify class counsel as an adequate representative as required by Rule 23(a)(4). This finding would necessarily result in per share settlements that would offer shareholders a fixed amount per share.[8]

The Supreme Court has a wonderful opportunity to benefit circuit and district court Rule 23 investigations by making a prima facie determination that fixed settlements based on aggregate damages presumptively violate the adequacy of representation requirements of Rule 23 (a).

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[8] Per share settlements could be the long sought silver bullet for meritless securities litigation. Settlements structured on a per share basis could be easily evaluated by both shareholders and courts. Class counsel fees would necessarily be a percentage of the claims filed which would closely align the interests of class counsel with the class. Low per share recoveries of a nuisance settlement would attract few claims as the small recovery would not justify the costs of proving and filing a claim. Consequently, it would be difficult for class counsel to recover litigation costs. Per share settlements would encourage the full prosecution of meritorious suits as only these suits would offer substantial fees.

An Efficient Market Bars Average Market Prices In Actual Damage Estimates

Both this Court and the circuit courts have uniformly held that actively traded markets with many informed participants and widespread access to information are presumed efficient. According to the Efficient Market Hypothesis (EMH) share prices bargained for on the U.S. stock exchanges provide the best estimate of the economic value of the corporation.

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business... Peil v. Speiser, 806 F. 2d 1154, 1160-1161 (3rd Cir. 1986) also cited in Basic Inc. v. Levinson, 485 U.S. 224, 241-242.
>
> ...
>
> 'No investor, no speculator, can safely buy and sell securities upon the exchanges without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells. The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings about a situation where the market price reflects as nearly as possible a just price.' Basic Inc. v. Levinson, 485 U.S. at 246 (1988), citing H.R. Rep. No. 1383 at 11.

In an efficient market, the dissemination of material misinformation can artificially inflate or depress share prices.

> The misstatements may affect the price of the stock, and thus defraud purchasers who rely on the price as an indication of the stock's value. By artificially

> inflating the price of the stock, the misrepresentations defraud purchasers who rely on the price as an indication of the stock's value. Peil v. Speiser, 806 F. 2d at 1160.
>
> ...
>
> 'Just as artificial manipulation tends to upset the true function of an open market, so the hiding and secreting of important information obstructs the operation of the markets as indices of real value.' Basic Inc. v. Levinson, 485 U.S. at 246 citing H.R. Rep. No. 1383, at 11.

Consequently when stock prices are inflated by the disclosure of false information, such as inflated statements of earnings, the actual damages incurred by shareholders who acquired their stock while the earnings were inflated are determined by the market's reaction when the accurate earnings information is disclosed.

> When markets are liquid and respond quickly to news, the drop when the truth appears is a good measure of the value of the information, making it the appropriate measure of damages. Goldberg v. Household Bank, F.S.B., 890 F. 2d 965 966-967 (7th Cir. 1989).

Thus, on February 8, 2001, when NICE's ADSs dropped $5.19 per share - following its announcement that it would reduce previously reported quarterly earnings for 1999 and the first three quarters of 2000 - that drop under the EMH is the measure of damages. (App. B, A-12 to A-13) Other measures of damages based on averaging market prices on days preceding and following the announcement of the corrected earnings are contrary to the EMH. Prices on these other days reflect the market's evaluation of other economic news extraneous to false earnings information the courts are

trying to assess. Averaging these prices only obscures the damages from the falsely reported earnings. Consequently, the Third Circuit opinion and the District Court's fairness assessment based on damages using average trading prices are contrary to the EMH and the cited Supreme Court and Circuit opinions.

The courts below misunderstood the arguments on economic theory in concluding that the EMH was merely a different theory than employed by plaintiffs' expert. The EMH is the economic theory that underpins the fraud-on-the-market theory on which the plaintiffs' case is based. The Seventh Circuit recently affirmed the supremacy of the EMH and the fraud-on-the-market theories. *"Basic founded the fraud-on-market doctrine on a causal mechanism with both theoretical and empirical power;"* West v. Prudential Securities, Inc., 282 F. 3rd 935 938 (7th Cir. 2002). It's heresy for the plaintiffs to abandon the EMH in estimating actual damages.

Although never stated, plaintiffs' expert's analysis was based on the assumption that the market for NICE stock on February 8 was not efficient thus making it necessary to average market prices over several days before and after the February 8 announcement. Plaintiffs' expert, however, never argued that the market for NICE stock on February 8 was not efficient nor did he state a rational for using a five day average. Of course it was just a coincidence that the five day average provided the lowest possible damage estimate that just happened to improve the appearance of the settlement's fairness![9]

[9] The plaintiffs informed class members that the five day average represented the maximum amount recoverable at trial. Please see note 4 on page 11.

While correctly observing that petitioner Hayes provided no economic justification for averages based on periods longer and shorter than five days, the courts below missed the premise of his argument. (App. A, A-6) Plaintiffs' expert had made no economic justification for using a five day average. Therefore, damages determined for averages of periods of different length would be equally valid. Consequently, the courts below have been misled by relying on a value which is the lowest possible among equally valid alternatives. (Cf. n. 4 p. 11). These opportunities for data manipulation would be eliminated by a Supreme Court requirement that actual damages are to be based on the drop in market prices when the truth appears as the Seventh Circuit found in Goldberg.

Presumption of Fairness Is Not A Standard for Settlement Approval

In reviewing the applicable law in settlement classes, Judge Becker determined the district court could maintain an initial presumption that the settlement was fair.

> Before sending notice of the settlement to the class, the court will usually approve the settlement preliminarily. This preliminary determination establishes an initial presumption of fairness when the court finds that: (1) the negotiations occurred at arms length; (2) there was sufficient discovery; (3) the proponents of the settlement were experienced in similar litigation; and (4) only a small fraction of the class objected. GM Trucks, 55 F.3d at 785.

The Panel and District Court opinions held that this presumption of fairness is not limited to the preliminary

settlement approval but would also apply to the final settlement approval.[10] (App. A, A-4 & App. B, A-14).

The Panel's opinion that district courts can maintain a presumption of fairness in considering final settlement approval conflicts with the Third Circuit's opinions in GM Trucks and Cendant. Judge Becker, noted that courts require a higher showing of fairness in cases like NICE where settlement occurred before class certification.

> We have already noted the special difficulties the court encounters with its duties under Rule 23(e) in approving settlements where negotiations occur before the court has certified the class. Because of such difficulties, many courts have required the parties to make a higher showing of fairness to sustain these settlements. See, e.g. Ace Heating & Plumbing

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[10] The District Court's opinion clearly relies on its presumption of fairness. For example, in assessing the risks of establishing liability, District Court determined that establishing the requisite scienter *"was not a slam dunk"* (App. A, A-5 & App. B, A-18) and noted that the defendants could have presented at least *"a credible defense to any assertion of scienter"* and then noted that *"...making any assessment of whether those arguments would have been successful is also not for the Court's consideration."* (App. B, A-19) Thus, the District Court never made an assessment of the risk of establishing scienter and consequently couldn't assess the risk of establishing liability. Clearly, the District Court's conclusion that the risks of establishing liability were "significant" was based on the presumption of fairness rather than an analysis based on the facts.

Similarly in assessing the risks of establishing damages, the District Court only acknowledged that *"...a wide range of potential recovery, if successful, were there."* (App. B, A-20) The "if successful" characterization, however, is no risk assessment at all as it is only an acknowledgement of an uncharacterized possibility. These examples show the District Court's fairness assessment was incomplete — a sure tip off that the District Court's fairness decision relied on its presumption of fairness.

Co. v. Crane Co., 453 F. 2d. 30, 33 (3rd Cir. 1971). GM Trucks, 55 F.3d at 805.

...

Without determining that the class actually was represented, the district judge has no real basis for assuming that the negotiations satisfactorily vindicated the interests of all the absentees. (Emphasis added) Id. 797.

These prior Third Circuit findings required the District Court to abandon its initial presumption of fairness in its final fairness deliberations.

Additional red flags were raised when the objectors questioned plaintiffs' good faith settlement negotiations; post settlement discovery; their understatement of attorney fees and the maximum damages available at trial; and the accuracy of their aggregate damage estimates at the Hearing. These red flags required that the District Court abandon its initial presumption of fairness. The Third Circuit in Cendant confirms that district courts are required to reexamine their fairness presumptions in light of subsequent contrary information.

At all events, this was a simple case in terms of liability with respect to Cendant, and the case was settled at a very early stage, after little formal discovery. Thus the possibility of rebuttal of the presumption of reasonableness must be seriously considered by the District Court on remand. (Emphasis added) Cendant, 264 F. 3rd at 285.

Presuming fairness, under all circumstances, is such a severe departure from the standards of judicial practice to call for this Court to exercise its supervisory power.

Settlement Class Was Not Certifiable

This Court recognized the continuing obligation of district courts to carefully evaluate the named plaintiff as a proper class representative in certifying a settlement class in an employment discrimination suit.

> We do not, of course, judge the propriety of a class certification by hind sight. The District Court's error in this case, and the error inherent in the across-the-board rule, is the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23 (a).
>
> ...Even after a certification order is entered, the judge remains free to modify it in light of subsequent developments in the litigation
>
> ...actual, not presumed, conformance with Rule 23(a) remains, however, indispensable. General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 160.

The record below shows that the District Court never made an evaluation of the lead plaintiff candidates as required by PSLRA and Rule 23(a)(4). The District Court's first mistake was its June 22, 2001 Order that consolidated fifteen individual suits and simultaneously appointed the lead plaintiffs and class counsel. Because the Consolidated Complaint was filed three months after the appointment of lead plaintiffs it was impossible for the District Court to know whether the lead plaintiffs' claims were typical of those of the class or whether they could adequately represent the interests of the class. The PSLRA, 15 U.S.C. 78u-4 (3)(B)(ii), requires that district courts decide the consolidation issue prior to the determination of the lead plaintiff. The proscribed process enables district courts to determine whether the proposed lead plaintiff is an adequate class representative.

This Court affirmed the district courts' obligation is to carefully evaluate the named plaintiff as a proper representative in certifying a settlement class in mass tort litigation.

> Nor can the class approved by the District Court, satisfy Rule 23(a)(4)'s requirement that the named parties "will fairly and adequately protect the interests of the class." The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. Amchem Products, Inc. v. Windsor, 521 U.S. 591 625 (1997).

Most recently the Fifth Circuit applied this Court's Rule 23 requirements to a royalty payment dispute.

> ...However, the district court never addressed whether Hunter is herself an adequate representative. Although the district court stated that "no conflicts exist to preclude certification," this is not a sufficiently "rigorous" analysis to demonstrate that Hunter is an adequate representative. ... Therefore, because the district court is required to conduct its own analysis to determine if the rule 23 requirements are met, the district court erred by failing to consider Hunter's adequacy. Stirman v. Exxon Corp., 280 F. 3rd 554 (5th Cir. 2002).

On December 11, 2002, the District Court certified the settlement class; once again without an investigation of the adequacy of lead plaintiffs or whether the class met Rule 23 requirements. (App. B, A-13-A-14) The Third Circuit in GM Trucks found this inattentiveness an abuse of discretion.

The district court certified the class provisionally in

> a pretrial order. ... However, the court did not make the findings we today hold that Rule 23 requires, not even upon approving the settlement. Because we hold that courts employing settlement classes must still make findings that the class complies with Rule 23(a) and the appropriate parts of Rule 23(b), the court's failure to comply with the rule in this respect is a plain error of law, and hence an abuse of discretion, requiring that the certification be set aside. GM Trucks, 55 F.3d at 800

This Court upheld the Third Circuit findings that district courts need to inquire into Rule 23 criteria before certifying settlement classes in the mass tort case that followed GM Trucks.

> But other specifications of the Rule [23] - those designed to protect absentees by blocking unwarranted or overbroad class definitions - demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold. Amchem Products, Inc. v. Windsor, 521 US 591 619 (1997)

Objector Hayes sought to raise the certification issue with the District Court by filing a 60(b) (2) motion for reconsideration after the district court approved the settlement on April 8, 2003. (App. A, A-3) The basis for the reconsideration was newly discovered evidence contained in a Preliminary Claims Administrator's Report submitted to the District Court after settlement approval. The claims evidence indicated that the Class did not meet the certification requirements of Rule 23. The problem was that the class definition

included shareholders which the Plan of Allocation excluded from participation in the Settlement Fund. About 38 percent of the members filing claims for 3.1 million ADSs were excluded from participation in the Settlement Fund. In addition, two of the lead plaintiffs–who are required by the PSLRA to have the largest financial stake in the litigation–didn't file claims. Consequently, the District Court did not certify a class that met the Commonality Requirements of Rule 23(a)(2), the Typicality Requirements of Rule 23(a)(3) and the Adequacy of Representation Requirements of Rule 23(a) (4).[11]

This Court has an especially timely opportunity to affirm that district courts are required to make thorough Rule 23 investigations in settlement classes in securities cases as has been explicitly required for settlement classes in employment discrimination, contractual disputes, product liability, and mass tort class litigation.

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[11] The District Court avoided the certification implications of the new evidence cited in the Rule 60(b)(2) motion in a teleconference hearing where it concluded that there was no new information because the Allocation Plan was disclosed in the Notice and class members knew who was eligible to participate in the settlement fund. The defendants argued that trades within the class period prior to the discovery of the fraud were properly excluded from participation in the settlement fund. The defendants did not explain why this intra-fraud trading would have generated so many claims. Because NICE's stock had appreciated substantially during the class period to just prior to the auditor's discovery of the fraudulent sales contracts, the number of losing intra-fraud trades should not have been significant. Additionally, the disallowed claims were among the largest claims and were filed by institutions that would not be expected to be active traders in a stock that historically was lightly traded. The trustees of Harvard University, for example, had a claim for 600,000 ADSs that was denied participation in the settlement fund. The more likely explanation is that the vast majority of non-participating claims - like the two lead plaintiffs not filing claims - had a December 28 claim that was not included in the Consolidated Complaint. In denying petitioner's 60(b)(2) motion, the District Court didn't think it important to distinguish between these possibilities.

The Denial of the Rule 60 Motion Challenging Class Certification Denies Due Process and is Contrary to the Public Policy Underlying the PSLRA

The public policy underlying passage of the PSLRA is to improve the practice of securities class action litigation which had long been exploited by class action lawyers to the detriment of shareholders and the companies they own. By requiring disclosure on a per share basis of damages, recoveries and attorney fees, PSLRA empowered class members to challenge settlements that were not in shareholders best interests. That public policy and the national economic interest in efficient securities markets is diminished when courts deny shareholders due process in adjudicating challenges to unfair or collusive settlements. To insure the realization of this policy, this Court should grant this petition and examine the Third Circuit's procedures which deprived the petitioner of his rights to appeal the District Court denial of his Rule 60(b)(2) Motion for reconsideration of settlement approval.

In reviewing the application of due process, this Court determined:

> Our past cases mandate that some kind of hearing is required at some time before a state finally deprives a person of his property interests. The fundamental requirement of due process is the opportunity to be heard and it is an "opportunity which must be granted at a meaningful time and in a meaningful manner." Parrott v. Taylor, 451 U.S. 527 538 (1981) quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

In NICE, the petitioner filed a timely notice of appeal

from the District Court's denial of his Rule 60(b)(2) motion. (App. A, A-3) The Third Circuit Panel belatedly[12] consolidated this appeal with the earlier appeal and then decided both appeals on February 9, 2004 without the benefit of a briefing on the 60(b)(2) appeal. (App. B, A-37) It was a denial of due process and against established judicial procedure for the Third Circuit to uphold the District Court's denial of appellant's 60(b)(2) motion without hearing the appellant.

Courts have a continuing duty to protect the interests of absent class members. The petitioner therefore urges this Court to recognize the lack of due process in the Third Circuit procedures with respect to the 60(b)(2) appeal and to remand the cause to the Third Circuit for consideration of the substantive issues of whether the NICE settlement class was properly certified under Rule 23. Please see IV. on page 22.

CONCLUSION

For more than twenty years, shareholders' class lawyers have been screwing members of the absent class by trivializing shareholders' fraud claims for the lawyers benefit. Congress has sought to curb the abuses by stiffening pleading requirements and empowering shareholders by requiring class lawyers provide shareholders information on a share basis about settlement recoveries, damages and attorney fees so that shareholders could make their own assessments about the fairness of a settlement. The courts below have ignored

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[12] In a letter dated September 19, 2003, the plaintiffs' co-lead counsel requested an expedited briefing schedule so that the 60(b)(2) appeal could be heard with the initial appeal. By order of the Clerk entered on November 5, 2003, this letter was construed as a motion and was sent to the merits panel.

requirements of the Private Securities Litigation Reform Act, as well as Supreme Court and Circuit precedent in certifying the NICE settlement class; assessing damages on the basis of unscientific estimates of aggregate damages; and using averages in estimating actual damages. By granting a writ of certiorari to review the decision of the Third Circuit upholding the District Court for the District of New Jersey's fairness decision on the NICE Systems settlement, this Court has a unique opportunity to improve the practice of class action securities litigation and benefit National wealth by improving the efficiency of the Nation's securities markets.

The writ should issue.

June 7, 2004

Respectfully submitted,

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Petitioner
4024 Estabrook Dr.
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APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 03-2262 and 03-3841

IN RE: NICE SYSTEMS, LTD
SECURITIES LITIGATION

JAMES J. HAYES,
Appellant

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civ. No. 01-cv-00737)
District Judge: Honorable Joseph A. Greenaway, Jr.

Submitted Under Third Circuit LAR 34.1(a)
February 4, 2004

Before: SLOVITER, NYGAARD and CHERTOFF, Circuit Judges.

(Filed February 9, 2004)

OPINION

PER CURIAM

James J. Hayes appeals pro se from the order of the United States District Court for the District of New Jersey approving the $10 million cash settlement in this securities fraud class action as fair, reasonable, and adequate, and dismissing the class action with prejudice. We will affirm.

Nice Systems Ltd. ("Nice") is an Israeli company whose ordinary shares have been listed on the Tel-Aviv Stock

Exchange in Israel since 1991. Nice's American Depository Shares ("ADSes") have been listed on the NASDAQ since June 1996. The Plaintiffs alleged in their Amended Class Action Complaint that during the Class Period,[1] Nice entered into an arrangement with Stevens Communications, Inc. ("Stevens"), a primary distributor for Nice in the United States, whereby Stevens was not obligated to pay for Nice products shipped to Stevens on a "consignment" basis unless and until Stevens sold the products. Plaintiffs alleged that contrary to the accounting profession's "Generally Accepted Accounting Principles," which strictly prohibited the recognition of revenue on consignment shipments. Nice wrongfully recognized revenues in connection with such consignment shipments made to Stevens throughout the Class Period. As a result, Nice's reported earnings were materially overstated, and the price of the ADSes was artificially inflated. On February 8, 2001, Nice issued a press release stating that it would need to restate downward its results of operations for 1999 and the first three quarters of 2000. Thereafter, numerous class actions were filed against Nice and certain individual defendants alleging violations of the Securities Exchange Act of 1934, specifically §§ 10(b) and 20(a) of the Act and Rule 10b-5. The District Court consolidated the actions in May 2001.

The defendants moved to dismiss the Amended Complaint claiming that the class plaintiffs failed to allege the requisite scienter, and also sought to move the action to Israel on forum non conveniens grounds. Upon completion of discovery focusing on the defendants' claims contained in the dismissal motion, the parties entered into intense settlement negotiations culminating in a stipulation of settlement in November, 2002. The stipulation provided for the creation of

---

[1] The "Class" was defined as all those persons who purchased or otherwise acquired Nice ADSes during the period from November 3, 1999 through February 7, 2001.

a settlement fund in the amount of $10,000,000, attorneys fees not to exceed 30% of the settlement fund, and costs not to exceed $250,000. After the District Court's preliminary approval of the proposed settlement in December, 2002, notice of the proposed settlement was mailed to more than 12,500 potential class members and a summary notice was published in the Wall Street Journal and in The Jerusalem Post, an Israeli newspaper. No members of the settlement class excluded themselves from the class. Appellant Hayes and another individual were the only class members to object to any aspect of the proposed settlement. Hayes, in particular, protested that both the number of ADSes damaged by the alleged SEC violation and the damages calculated per ADS were too low. He proposed that there were at least 7,000,000 damaged ADSes, not 4,460,500, the figure calculated by the class plaintiffs' expert, and that the damages per ADS was approximately $5-6, not $3.50. He also claimed that the number of damaged shares should be fixed at a settlement hearing upon the completion of the claims process, and that the notice to the class was defective.

The District Court held a fairness hearing on the proposed settlement on March 31, 2003. Hayes attended pro se, and argued his objections before the court. The District Court finally approved the settlement by order entered April 8, 2003. Hayes timely appealed. Thereafter, Hayes filed a timely Rule 60(b)(2) motion alleging newly discovered evidence, namely the claim administrator's report. The District Court denied the motion on its merits.[2] Hayes appealed.

We have jurisdiction under 28 U.S.C.§§ 1291. We will uphold a District Court's approval of a class action settlement

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[2] Hayes filed a timely notice of appeal from the District Court's denial of the Rule 60(b) motion. The appeal is docketed as 03-3841. The Appellees' motion for expedited appeal, construed as a motion to consolidate the appeals at Nos. 03-3841 and 03-2262, is granted.

unless there has been an abuse of discretion. See In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liability Litig.. 55 F.3d 768, 782-83 (3d Cir. 1995) (hereinafter "GM Trucks"). The District Court's "findings required by the Girsh [v. Jepson. 521 F.2d 153 (3d Cir. 1975)] test are factual, which will be upheld unless they are clearly erroneous." Id. at 786.

Applying the factors for assessing the fairness of a settlement set forth in Girsh, the District Court correctly concluded that the settlement appeared fair, reasonable, and adequate in light of the attendant risks of litigation.[3] As a preliminary matter, the District Court correctly determined that the presumption of fairness applied in this case because the negotiations occurred at arms length; there was sufficient discovery; the proponents of the settlement were experienced in similar litigation; and only two people out of the entire class membership objected. See GM Trucks. 55 F.3d at 785.[4]

Addressing the first Girsh factor, the District Court found that further discovery and litigation would be expensive, complex, and time-consuming. The Court noted that relevant

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[3] "Factors relevant to determination of fairness of a class action settlement are (1) complexity, expense and likely duration of the litigation; (2) reaction of the class to settlement; (3) stage of the proceedings and amount of discovery completed; (4) risks of establishing liability; (5) risks of establishing damages; (6) risks of maintaining the class action through trial; (7) ability of the defendants to withstand greater judgment; (8) range of reasonableness of settlement fund in light of best possible recovery; and (9) range of reasonableness of settlement fund to possible recovery in light of all attendant risks of litigation." Girsh. 521 F.2dat 157.

[4] Hayes does not dispute these findings. Rather, he argues that the presumption does not apply to the court's final approval of the settlement under In re Cendant Corp. Securities Litig.. 264 F.3d 201 (3d Cir. 2002). Hayes's reliance on In re Cendant Corp. Securities Litig. is misplaced. Nothing in that opinion limits the operation of the presumption to preliminary approvals granted prior to notice to the class of the proposed settlement offer. Thus, we find that the District Court did not abuse its discretion in applying the presumption of fairness in this case.

witnesses were located both in the United States and in Israel, necessitating discovery through The Hague Convention, and that matters of international law might have to be addressed. In addition, both sides would have to engage in discovery and expert analysis of massive amounts of financial information, all of which would be time-consuming and costly. Looking to the second Girsh factor, the District Court determined that the reaction of the class to the proposed settlement was overwhelmingly supportive, between 99.98 and 99.99% having approved it. In relation to the second factor, the District Court also emphasized that notice to the class, despite an inadvertent typographical error, met all of the requirements of the law.

The District Court found that settlement at a relatively early stage in the proceedings achieved the best result for the proposed class because counsel had put itself in a position to discern the critical facts by conducting sufficiently detailed and focused discovery and investigation, and had consulted extensively with damages and accounting experts. As for the risks of establishing liability, the District Court determined that proving that the defendants made a material omission/misstatement that caused damage to the class and was done with the requisite scienter, was not a "slam dunk." The District Court noted the plaintiffs' acknowledgment that the defendants could have presented at least a credible defense to any assertion of scienter. Thus, the risks of establishing liability were significant. Likewise, the District Court found that the risk of establishing damages was high because it would entail protracted expert testimony on the appropriate damages model and underlying economic theory to be employed, and on issues regarding how to count damaged ADSes, and what period of time should be used to calculate damages per ADS. As for the risk of maintaining the class throughout trial, the District Court candidly noted that this was difficult to assess but that obviously a risk existed. The District Court also correctly concluded that Nice could not

withstand a greater judgment in light of the possible negative effect on the defendant's resources occasioned by political instability in Israel, where Nice is headquartered. Finally, the District Court properly determined that the settlement represented about 68% of the class plaintiffs' estimate of total recoverable damages for the entire class.

In approving the settlement as reasonable, fair, and adequate, and in rejecting Hayes's objections, the District Court relied on the declaration of class plaintiffs' damages consultant, Michael A. Marek, CPA. Specifically, the District Court found that Hayes provided no reasonable basis for the court to adopt Hayes's assessment of 7 million damaged ADSes over Marek's figure of 4,460,500, which accurately reflected the Nice ADSes that were purchased or acquired during the Class period and held through the end of the Class Period. As for Marek's assessment of the damages cap of $3.50 per ADS, the District Court noted that the figure was based on a five-day window before and after the alleged securities violation and that Hayes provided no economic reason why his proposed 1-day, 10-day, or 90-day windows were more accurate or reliable, claiming only that each of these time periods yielded a higher damages cap. Finally, the District Court correctly rejected as meritless Hayes's request to postpone ascertaining damages until the claims process was complete.

Upon review of the record and thorough consideration of Hayes's arguments on appeal, we find that the District Court did not abuse its discretion in approving the settlement. Hayes's argument that the District Court could have employed a different economic theory to determine actual damages prior to approval of the settlement falls far short of showing that the District Court abused its discretion. Although aggregate damages calculations based on a proportionate trading model may not be presented to a jury at trial for the purpose of establishing actual damages, settlements of class actions do not require a showing of actual damages

in order to be adjudged fair, reasonable, and adequate. See Girsh v. Jepson. 521 F.2d at 160; In re Cendant Corp. Litig., 264 F.2d 2286, 301 (3d Cir. 2001) [sic]. We note with interest that Hayes himself used the proportionate trading model in arriving at his calculation of 7,000,000 damaged shares. We find no errors of fact or law in the District Court's application of Girsh. or in its reliance on the Marek Declaration. As for Hayes's claims regarding attorneys fees and costs, because Hayes did not object to or otherwise challenge the award of attorneys fees and costs in the District Court, the claims are waived, and we will not review them for the first time on appeal. See Hams v. City of Philadelphia. 35 F.3d 840, 845 (3d Cir. 1994).

Finally, the District Court did not abuse its discretion in denying Hayes's Rule 60(b) motion. See Lorenzo v. Griffith. 12 F.3d 23, 26 (3d Cir. 1993) (standard of review). The District Court properly found that Hayes's motion contained no newly discovered evidence where the purported evidence was in fact disclosed to the entire class in the notice of settlement in the preceding year.

Accordingly, we will affirm the District Court's judgment. Plaintiffs/Appellees' motions for leave to expand the record and amended motions to expand the record, including the Final Report of the Claims Administrator, are denied.[5]

---

[5] Counsel for plaintiffs/appellees has submitted to this court the Final Report of the Claims Administrator. As this is not part of the Record, we do not consider it, and suggest that counsel may wish to file it in the District Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 01-737

IN RE: NICE SYSTEMS LTD., SECURITIES LITIGATION
NAHUM DAVID, ALTSHULER-SHAHAM MUTUAL FUND MANAGEMENT, LTD., on behalf of themselves and all others similarly situated; AFIKIM MANAGEMENT OF MUTUAL FUNDS (1989) LTD.; ADAM BYRNE; DRESDNERBANK INVESTMENT MANAGEMENT; E.H. TEPE CO., INC.; SCOTT ANDREW KRING; KHAIKIN SERGEY, on behalf of himself and all others similarly situated; SHINNECOCK CAPITAL, LLC., on behalf of itself and all others similarly situated; LASCHIVER SERGE; JAY SHAPIRO, on behalf of himself and all others similarly situated; BENJAMIN Z. LAUFER, on behalf of himself and all others similarly situated; GIL DORANI, on behalf of himself and all others similarly situated; DINA COHEN; PAUL LIBOSZOWSKI; SHELDON M. GOLOMBECK; JAY D. SMITH, on behalf of himself and all others similarly situated; YUNUS DADABHOY, on behalf of himself and all others similarly situated; LINDA ADLER, individually and on behalf of all persons similarly situated,

Plaintiffs,

V.

NICE SYSTEMS, LTD.; BENJAMIN LEVIN; HAIM SHANI; LAURI A. HANOVER; AVRAHAM LAZAR; YUVAL YANAI; MORGAN STURDY; DAPHNA KEDEMI; MORDECHAI GOLAN; DAVID BEN-AEEV,

Defendants.

BEFORE;

THE HONORABLE JOSEPH A. GREENAWAY, JR., U.S.D.J.

APPEARANCES:

POMERANTZ, HAUDEK, BLOCK,
GROSSMAN & GROSS
BY: MARC I. GROSS, ESQ.
-AND-
KANTROWITZ, GOLDHAMER & GRAIFMAN
BY: GARY S. GRAIFMAN, ESQ.
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Benjamin Levin,
Mordechai Golan
Avraham Lazar,
David Ben-Aeev

TRANSCRIPT OF PROCEEDINGS:

OPINION

Newark, New Jersey
April 7, 2003

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

THOMAS F. BRAZAITIS, C.S.R., Official Court Reporter

THE COURT: May I have the appearances, please.

MR. GROSS: Good morning, your Honor.

Marc Gross, Pomerantz, Haudek, Block, Grossman & Gross, New York City, for the plaintiffs.

MR. STRAUSS: Joes Strauss, Kaplan, Fox & Kilsheimer, for the plaintiffs.

MR. GRAIFMAN; For the plaintiffs, Gary Graifman, Kantrowitz, Goldhamer & Graifman.

MR. KADET: Sam Kadet from Skadden, Arps, Slate, Meagher & Flom, for defendants Nice Systems, Ltd., Benjamin Levin, Mordechai Golan, Avraham Lazar, David Ben-Aeev.

And James Brown.

THE COURT: On March 31st, the Court heard argument from counsel as well as the objectors Hayes and counsel for the objector Weiderman with regard to what is before the Court and what is the final judgment approving settlement and dismissing claims with prejudice.

In this fairness hearing, everyone was given an opportunity to be heard to exhaustion, probably, but certainly as much as they substantively wanted to put on the record.

I note today, before I read into the record the Court's determination, that neither of the objectors is present, nor is any counsel on behalf of any of the objectors. I do want to make sure about one housekeeping matter.

Counsel, have any of you received anything further subsequent to our hearing last March 31st from either of the objectors?

MR. GROSS: Your Honor, no, we have had no communication whatsoever with the objectors.

MR. KADET: Same here. Judge.

THE COURT: I want to make sure the record is complete, no submission by any of the attorneys representing any of the parties here, in addition to what the Court acknowledged on the record they didn't receive with regard to this fairness hearing and the approval of the final judgment.

MR. GROSS: That's correct, your Honor.

MR. KADET: Yes, Judge.

THE COURT: As a further housekeeping matter, with regard to the findings that the Court has to make with regard to the settlement, am I correct that the matters that have to be placed on the record are the Court's findings with regard to whether the settlement satisfies the standard for approval of the class action and the many factors that go into that, the request for attorney's fees, the Court's findings with regard to the specific objections articulated by the two objectors, and probably intertwined in all of that, the Court's acceptance or theoretically, rejection of Mr. Marek's submission in support of the final approval?

MR. GROSS: Your Honor, I would just add two clarifications to that: We do also have a request not only for fees but for expenses.

THE COURT: Right.

MR. GROSS: And there is also a plan of allocation that we have submitted to the Court which was noticed to the class. There was no objection to that. But we're also asking for your formal approval of that. That will be the guideline for allocation of the settlement funds with all the claims that are actually filed.

THE COURT: Now, the plan of allocation is a specific finding within the final judgment approving settlement, presuming that it's approved?

MR. GROSS: Yes.

THE COURT: Are there specific findings the Court has to make on the record with regard to the plan of allocation or are the findings that I've alluded to sufficient for purposes of the record?

MR. GROSS: I think the two would overlap.

All that's necessary is that so long as the plan of allocation seems fair and reasonable, that would be sufficient, your Honor.

(Pause.)

THE COURT: This Court has before it an application by lead plaintiffs seeking final approval of a prepared settlement, plan of allocation and plaintiffs' counsels' request for an award of attorneys' fees and reimbursement of expenses pursuant to Federal Rule of Civil Procedure 23 (e).

The Court has received papers from the plaintiffs, defendants and two objectors with regard to this application. The application will be granted based on the findings that the Court will enunciate on the record.

First, the background of this matter: This securities class action was brought on behalf of all persons who purchased or otherwise acquired American Depository Shares ("ADSs") of Nice Systems, Ltd. ("Nice" or the "Company") from November 3, 1999 to and including February 7, 2001. Specifically, the Consolidated Amended Class Action Complaint alleged that defendants violated Section 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder by issuing false and misleading statements during the class period concerning Nice, including the company's revenues and earnings.

The Complaint alleged that over a period of more than 15 months, defendants repeatedly published materially false financial statements and earnings reports regarding Nice. These statements materially inflated the company's true financial performance. Indeed, as alleged. Nice, in violation of generally accepted accounting principles, recognized revenues on consignment shipments to one of its leading distributors in the United States, the impact of which was to inflate materially and artificially the company's reported earnings.

With this alleged scheme. Nice gave the impression during the Class Period that it was consistently meeting and beating Wall Street earnings estimates, which, in turn, caused the price of Nice's ADSs to be inflated artificially.

On February 8, 2001, Nice revealed that it was revising downward its estimate of results for the quarter ended

December 31, 2000 and would restate downward previously reported revenues and related earnings for 1999 and for the first three-quarters of 2000 because, inter alia. Nice improperly recognized revenues on consignment shipments to Stevens Communications, one of the company's distributors in the United States. The market's reaction to the news was a significant drop in the price of Nice ADSs.

Shortly after the company's February 8, 2001 disclosure, a series of class actions were filed with this Court alleging that defendants had violated the federal securities laws. These actions were subsequently consolidated, and pursuant to the provisions of the PSLRA, lead plaintiffs and co-lead counsel were appointed by this Court to prosecute the claims. The Complaint was filed by plaintiffs on August 20, 2001 setting forth in detail plaintiffs' allegations. Defendants moved to dismiss the Amended Complaint arguing that (i) the United States was a forum nonconveniens and that the case be transferred to Israel where another class action against Nice was pending; and (ii) plaintiffs failed to allege adequately that defendants had acted with the requisite scienter. Plaintiffs opposed the motion on both grounds.

After the motion to dismiss was fully briefed and, sub judice, defendants and plaintiffs began intense negotiations in an attempt to resolve the litigation. These arm's-length negotiations led to the principal terms of a settlement outlined in a Memorandum of Understanding dated September 17, 2002, which provided, inter alia, for plaintiffs to conduct certain due diligence confirmatory discovery concerning their claims and defenses and for a cash payment to the class of $10 million to settle all of plaintiffs' claims.

After the period of due diligence had been satisfied and the due diligence had, in fact, occurred, the parties negotiated and entered into a formal stipulation of settlement on November 15, 2002.

For the record, the plaintiffs, of course, believe that the claims, as alleged in the Complaint, have merit, and they

also recognize that there are acknowledged risks, expenses and other accorded problems with continuing to prosecute the claim against the defendants, including surviving a motion to dismiss as well as successfully prosecuting the action through trial and the likely appeals. And it is based on those other reasons that the settlement is submitted to the Court.

Plaintiffs assert that the settlement represents an extraordinary recovery for the Class, particularly given the appended risk of continued litigation. And the plaintiffs seek the final approval of this Court.

Of course, it is evident by the legion of cases cited, and that the Court is familiar with, that the courts, as a general matter, favor settlements of class actions.

This Court, and courts similarly situated, play an important role in the class action dialogue, and is the ultimate gatekeeper in determining whether settlements should indeed be approved. There are many factors which go into the consideration of whether a settlement is adequate, fair and reasonable and whether, ultimately, the Court should determine that its approval is justified.

I note as an initial matter that it is apparent to me, based on the papers that have been submitted, that this settlement is the product of an arm's-length negotiation. Needless to say, counsel appearing on both sides in this matter are extremely able, and I do note that the case law does require a presumption of fairness based on those findings.

In the colloquy last week there was significant discussion of the seminal case here in the Third Circuit on matters of the standard for approval of class actions, and that is Girsh v. Jepson, 521 F.2d 153, a 1975 Third Circuit case. In that case, the Third Circuit noted the factors that a district court should take into account in determining whether or not a proposed class action settlement should be approved.

I note, parenthetically, that the Third Circuit, within the last two years, in In re Cendant, affirmed the application

of these Girsh factors. So it is appropriate that the Court apply them here.

Those factors are as follows: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund to a possible recovery in light of all attendant risks of litigation.

With regard to the first factor, the complexity, expense and likely duration of litigation, it is apparent, and certainly is apparent to this Court, that any question of success on motions one way or the other, whether it be the defendants' ability to succeed on motions to dismiss or the plaintiffs' ability to stave off any motion to dismiss, is by its very nature a complex matter in which, unless one is very good at reading tea leaves, is difficult for the parties to discern.

This type of shareholder litigation is indeed difficult and complex. One thing is for certain, in the event that the motion to dismiss was successfully challenged, the road ahead would in all likelihood have been of rather lengthy duration, considerable expense and undoubtedly complex for the parties, the attorneys and the Court itself.

I think it is evident for any casual reader of this record or any appellate court reading this record down the road that the requirements of the attorneys in aggressively prosecuting a class action would require a substantial investment of time and a substantial expenditure with regard to expenses and a considerable amount of time and effort by the parties themselves.

It is apparent in class action litigation, and in securities class action litigation in particular, that there are complex economic issues that have to be ferreted out. Depositions of

experts attempting to discern, digest and then interpret masses of financial information.

The papers that have been submitted to me both by counsel and the expert's declaration that has been submitted, the evidence to the Court that any consideration of continued litigation in this matter would have been extremely complex and/or require a substantial evidence of effort and expense on the part of all of the parties.

I do note that part of that expensive effort would have been extended because there are persons relevant to the consideration of the litigation both here and in Israel.

I note, parenthetically, that there would have been matters with regard to international law that would have to be ferreted out, issues that would likely involve matters that would have to be addressed through The Hague, which, frankly, would only complicate and lengthen matters.

Needless to say, the ultimate consideration of the Court in any question of dealing with complexity and expense is the ultimate recovery, if appropriate, to the persons who have suffered the damage that is the subject of the action. And certainly the class, as a theoretical matter, would have a distinct interest in attempting to achieve its objectives short of considerable expenditures of money, but more important, considerable lapse of time.

The next issue for the Court's consideration is the reaction of the class to the settlement. The lead plaintiffs have noted that both they and the class as a general matter overwhelmingly support the settlement.

An interesting tidbit that arose in the submission by the defendants is that the approval of the class action appears to be somewhere between 99.98 and 99.99 percent of the Class depending on what exact calculation the Court may adopt on the correct number of ADSs to use in its calculation. Whichever one the Court ultimately adopts, certainly approval of 99.98 or 99 percent of the Class would reflect an overwhelming support of the settlement, so I would adopt,

for the purpose of the record, that the Class has overwhelmingly approved of the proposed settlement.

I also note, parenthetically, that the notices that were sent out met all of the requirements of the law, more than 12,500 copies of the notice concerning the proposed settlement were sent out, and summary notice of the proposed settlement and hearing appeared in the national editions of the Wall Street Journal and the Jerusalem Post.

So it's clear to the Court that class members had an opportunity, if they so chose, to voice any objection if that were their desire. As noted, there were only two objections filed, and the Court, at the appropriate time, will address those two objections.

The third factor, the stage of the proceedings and the amount of discovery completed, also speaks in favor of the Court's ultimate approval.

The settlement achieved at probably the earliest stage that a class action could responsibly be settled, and that is while the motion to dismiss was sub judice to this Court, reflects that the settlement was achieved in the process of litigation. And it reflects that an achievement that the Third Circuit has acknowledged is a time in the proceedings that should be lauded based on the essential theory that achieving the best result for the proposed class in the shortest period of time best achieves the best interests of the Class.

Here, lead plaintiffs' counsel had conducted an extensive investigation, including consulting with damage and accounting experts, analyzing the facts and circumstances of the defendants' conduct and the damages suffered by the Class.

As noted earlier, plaintiffs conducted due diligence, confirmatory discovery, reviewed critical documents and did depose Nice's current C. F. O.

Through these efforts it is clear to this Court that plaintiffs' counsel had put itself in a position to discern the critical facts, to understanding the interplay between those

facts and the attendant law within the Third Circuit and to come to a reasonable determination that attempting to resolve this case short of an agonizingly long litigation process was in the best interest of the Class.

The fourth factor, the risks of establishing liability, also speaks in favor of approval. To succeed on their claims, plaintiffs would have had to establish, among other things in this matter, that the defendants had made a material omission or misstatement that caused damage to the class. In addition, they would have had to prove the defendants acted with requisite scienter in violating the security laws.

There's no doubt that in any assessment of the likelihood of success in matters of this type could not be, to use a colloquial phrase, a slam-dunk. Indeed, the opposite is essentially a more accurate assessment, and that is that plaintiffs face significant risk in proving defendants' violations of the securities law.

It would not be an overstatement to say that in securities law, or in any issues that are involved in federal litigation, attempting to prove the requirement of scienter is probably one of the most difficult issues to provide sufficient proof of. The ability to prove or be unable to prove scienter, which is an essential element of any claim pursuant to 10b-5, really is the crux of the matter.

Plaintiffs here would have had to have shown that defendants acted with a mental state embracing intent to deceive, manipulate or defraud according to Supreme Court precedent. Specifically, plaintiffs would have had to have shown that defendants acted with knowledge or reckless disregard and the company's financial results were artificially inflated throughout the class period as recognized by revenues on consignment shipments to the United States based distributor of Nice products.

The quantum of proof required to meet such a standard is certainly high. I note this not to intimate that a likelihood of success would not have been successful, but more

important, with regard to the factors raised in Girsh to note that proving scienter and the attendant requirements under a scienter analysis are extremely difficult.

Part of that assessment that plaintiffs' counsel made, and is acknowledged on the record here, is that defendants could have presented at least a credible defense to any assertion of scienter. Specifically, plaintiffs' counsel anticipated that defendants would most likely argue that the Nice headquarters in Israel, as well as with regard to individual defendants, all of whom were executives in Israel, were not involved in, or aware of, the consignment arrangements with United States distributor Stevens which would be entered into by Nice personnel in the United States.

In addition, they could have asserted and argued that when the corporate headquarters and the individual defendants first learned of the side agreements, they believed it would be an insignificant issue based on the advice they received from the outside auditors and internal control auditor. When they ultimately learned the true scope and nature of the consignment issue, they acted properly and promptly to take appropriate measures.

Whether this is, in fact, what the defendants would have ultimately argued is not an issue for the Court's determination, nor making any assessment of whether those arguments would have been successful is also not for the Court's consideration. However, noting that those defenses and arguments would have been available to the defendants in response to any assertion by plaintiffs' counsel that they had or that they could meet the scienter requirements certainly leads this Court to conclude that significant risks were involved with regard to establishing liability.

Factor number five, pursuant to the Girsh standards, is the risk of establishing damages.

In this, as with many class actions, it is certainly appropriate to acknowledge that there are a wide range of possible potential recoveries that could be appropriate for the

class if it were successful.

It is certainly appropriate for this Court to acknowledge in assessing these factors that the potential defenses with regard to economic damage that are present would certainly create substantial risk that the plaintiffs, while they may ultimately have been successful, could have ultimately recovered an amount of damages that would be seen as no more than a pyrrhic victory, as well as the other end of the spectrum in which a potential amount of recovery could have almost equalled manna from heaven. The point that the Court must acknowledge is, looking at the issue of the risk of establishing damages here is that a wide range of potential recovery, if successful, were there.

I note that one of the issues raised by the parties, and certainly acknowledged, by the Court with regard to this factor, is that, as with many issues that come before juries and the court, there would be a battle of experts, and that would have to address, number one, what damage model was appropriate, what underlying economic theories should be employed in addressing and applying particular damage models.

I note that during the course of oral argument on this matter, there were issues expressed with regard to what number of ADSs should be the ones counted with regard to trying to get a fix on the number of potential class members there were and how large the class was. There were also issues based on varying economic issues as to what period of time should be employed in analyzing the potential damages. All of this certainly, if the case had proceeded to trial, would have led to volumes and volumes of expert testimony. And certainly no certitude with regard to who among the experts would have been adopted by the ultimate factfinder.

The sixth Girsh factor is the risk of maintaining the class action through trial.

In any class action there are always risks with regard to the Class' ultimate certification or motions that oftentimes

come to the fore for the consideration of the district court in the first instance, and that is decertification. Obviously, that was a risk that has to be taken into account according to the Girsh factors but while difficult to specifically access is one that the Court has to acknowledge is one that plaintiffs properly took into account in reaching settlement.

The seventh factor is the ability of the defendants to withstand a greater judgment.

The proposed settlement amount, according to the damages calculations proposed by the plaintiffs, represent 70 percent of the damages of plaintiffs' damages consultant believes were attributed to the particular fraud involved in this matter. Part of the ability to ascribe this high percentage to the potential recovery is a recognition that continued litigation would dissipate the value of the available resources for recovery for the class.

I do note that one additional consideration with regard to this issue is that Nice's headquarters is located in Israel and there are always issues of security concern in Israel and the potential political instability of that region, particularly given the current state of war in the region.

The eighth factor, the range of reasonableness of the settlement fund to a possible recovery in light of all of the attendant risks of litigation. Frankly, seems to be a catchall factor which applies all of the seven previous factors that the Court has laid out its rationale in rather lengthy terms.

It is apparent to this Court that, keeping all of those factors in mind, that the settlement is indeed reasonable in light of all of the attendant risks of litigation.

I also note that the settlement does appear to be reasonable in light of the notion of the best possible recovery. I have reviewed the Marek declaration, which I will get into more detail in a little bit, and certainly, given the experience of Mr. Marek, specifically his experience in the securities area, the reasonableness of the assumptions and the ultimate findings, it would appear that a conclusion that $14.8 million

is a finite and definable amount as representing the total damages sustained by the class members as a result of the alleged fraud, that a recovery of $10 million, which is essentially 70 percent of that potential total damages, would be reasonable in light of what the best recovery would likely be.

One of the specific considerations that the Court must make in addition to applying the Girsh factors, as the Court has, is whether the Court should approve the plan of allocation.

The plan of allocation submitted for the Court's consideration was devised by lead counsel in consultation with its damages consultant. The specific plan of allocation was developed after significant investigation and research concerning specific facts in this case.

Based on the Court's analysis and review of the plan of allocation, it is this Court's view that the plan of allocation is fair, reasonable and adequate. The favorable reaction of the class would also support approval of the plan of allocation. As noted earlier on the record, there were only two, literally one and two objectors, to this settlement and the proposed plan of allocation.

Given the fact that there was appropriate notice, as I have also noted on the record, to over 12,500 potential class members, it would certainly logically appear, based on the Court's findings thus far on the record, that the plan of allocation is fair, reasonable and adequate and should be adopted and endorsed by the Court.

I know that as a theoretical matter one can apply — there is a question actually — the percentage of recovery theory on the lodestar and appears, based on what's been presented to me, that the percentage of recovery theory is what is generally applicable currently given the state of both Third Circuit law and district courts that have been applying Third Circuit law as a general matter.

I wondered whether you provided the lodestar for informational purposes or whether you believed that a find-

ing of reasonableness under both theories or both applications is required for the record?

MR. GROSS: I don't know, your Honor, that a finding is necessary under the lodestar multiple method. On the other hand, I do believe in the context of making a decision with regard to the appropriate percentage that an acknowledgment of the lodestar and a determination that there is not an excessive windfall to the plaintiffs would be appropriate. So I'm not sure if that answers your question or —

THE COURT: Sounds like a footnote.

(Pause.)

MR. GROSS: Your Honor, before we —

(Pause.)

THE COURT: At this point, it is most appropriate to address the objectors to the proposed settlement.

I will, of course, address the specific objections, but I have to read into the record the assessment of the defendants submitted for the Court's consideration of the summary of the objections.

The defendants noted in their papers that it was to derail a $10 million settlement which was reached after careful investigation and arm's length negotiation by experienced counsel embraced by 99.99 percent of the class to ignore the controlling provisions of the provision securities litigation forum act of 1995 pursuant to which the plaintiffs and lead counsel were appointed and now subjected objectors and their counsel class representatives try to order the other 99.99 percent of the class embark against the collective wishes a long, expensive, extremely risky litigation with objectors at the helm.

I thought that was interesting prose, and maybe reflected a little bit of the approach that probably the plaintiffs and defendants share in their view of the objections filed.

But, in any case, the specific objections are as follows: The Hayes objection, which is a reflection of Mr.

James J. Hayes, who did appear at the fairness hearing on March 31st, about a week ago, are as follows: Number one, the plaintiffs' utilization of an estimated number of damaged ADSs of 4,460,500 was too low and plaintiffs' damages cap of $3.50 per ADS was too low. Number two, the notice was fatally defective and must be reissued because it noted that the amount of attorneys' fees and costs on an average per ADS basis was incorrectly stated as .073 and not — or I guess seven — a little over seven cents as opposed to 73 cents per ADS. And number three, that the settlement hearing should be delayed until the claims administration process is complete.

The other objection is by Mr. Weiderman. Mr. Weiderman was represented by counsel at last week's hearing, represented by counsel Nicholas Fausto. They made also four points initially: The terms of the release of the defendants is too broad, there is insufficient information in the notice concerning damages, the parties did not negotiate in good faith, and the request for attorneys' fees is unreasonable. The third point, the parties did not negotiate in good faith, was withdrawn by Mr. Fausto during his oral presentation on March 31st.

First, a general comment as to each of the objectors. Mr. James J. Hayes had an opportunity to address the Court on March 31st. Mr. Hayes appeared pro se and seemingly did not have any expert report for the Court's consideration. During the Court's colloquy with Mr. Hayes, the Court inquired, number one, of Mr. Hayes' qualifications to challenge Mr. Marek's declaration which made several assumptions leading to the damages calculations. Also, the Court inquired of Mr. Hayes whether there was any logical basis or economic theoretical basis for the Court to, essentially, reject Mr. Marek's proposal in favor of what Mr. Hayes suggested.

This Court concludes now, based on the written submissions of Mr. Hayes and the oral presentation, that while Mr. Hayes may be an experienced investor, there's no

evidence of that before me other than his statements. There was nothing about his oral presentation or the presentation in his papers which would lead this Court to conclude that he has the ability to satisfy the Court that the conclusions that he has reached are other than conclusory assertions based on supposition and not credible economic theories that the Court should substitute rather than adopting Mr. Marek's assumptions and conclusions.

Mr. Fausto on behalf of Mr. Weiderman gave what could only be described as, frankly, a perfunctory representation in which the very sketchy papers that were submitted to the Court really provided no basis for this Court to come to a conclusion that any of the objections raised were valid and should be sustained.

Now for a specific analysis of the specific objections raised: Hayes' first objection that the plaintiffs' utilization of an estimated number of damaged ADSs at 4,460,500 is inappropriate. He argues that the number of damaged ADSs — that is, ADSs subject to damage based on the alleged fraud —is more appropriately calculated 87 million. He also quarrels with the plaintiffs' damages cap of $3.50 per ADS as too low.

This specific objection is one that the colloquy that Mr. Hayes and the Court engaged in last week specifically came to the fore. Mr. Hayes, much to the chagrin of the Court, was unable to articulate a basis for the Court to adapt his alternate theory both with regard to the number of eligible ADSs and with regard to the $3.50 of potential damage per ADS

Specifically, we engaged in an extended colloquy on whether or not the spectrum or span of time that Mr. Marek adopted as the basis for his analysis was appropriate. The colloquy addressed whether one day on either side of the fraud was appropriate, whether five days on either side of the fraud was appropriate and whether ten days on either side of the fraud was appropriate.

While as a theoretical and academic matter the colloquy was interesting, it certainly provided no basis for the Court to challenge the conclusions of Mr. Marek. Mr. Marek's declaration is impressive both in its calculations but, frankly, in the conservative manner in which he addressed the issues and came to his conclusions.

I do note, more importantly, that the Court notes that Mr. Marek is a person who is eminently qualified to render the opinions that he has with regard to the settlement of approval. He is a founding member of the Financial Markets Analysis, L.L.C., which is a securities analysis firm in Princeton and San Diego. He's a 1984 graduate of the Wharton School. He was a research analyst for a couple years for Sage Data, Inc., also in the Princeton area. He was a vice president with Princeton Venture Research, which involved the securities valuation and financial analysis in connection with Investment Banking Venture Capital, and he was also a securities expert for consulting operations, prepared company Industry research reports, valuation and fairness opinions, was responsible for project management and project research personnel. His role as a founding member of the Financial Markets Analysis, L.L.C., as well as Triumphed Partners, he provides financial analysis valuation services and expert litigation support and testimony. His areas of concentration include valuation securities, businesses, economic issues and has appeared for testimony in securities class action litigation. And his clients include corporations, the government, specifically the SEC, law firms, institutional and individual investors. He is a chartered financial analyst, a member of the New York Society of Security Analysts, a member of Association of Investment Management and Research and a member of the American Economics Association.

Specifically, with regard to the submission for the Court's consideration, he has noted that his testimony in prior matters has concentrated on substantive areas of market efficiency, loss and damage causation, the valuation of

publicly traded securities based upon hypothetical of alleged misstatements and the disclosure of alleged omissions and representations as well as damages calculations.

In other words, his specific area of expertise is exactly what is required in attempting to analyze the fairness and reasonableness of the settlement that the Court must do here.

In paragraph five of his declaration, Mr. Marek noted that he reached the following opinions: In his opinion, there is economic evidence which indicates that the defendants' alleged misstatements and omissions caused the price of Nice ADSs to be artificially inflated and caused plaintiffs to suffer damages, and secondly, that the aggregate recoverable damages suffered by the Class members as a result of purchases of ADSs during the Class Period under Section 10(b) of the Securities Exchange Act of 1934 totaled approximately $14.8 million.

In the declaration, Mr. Marek specifically listed all of the matters that he took into account, including the objections that the Court is currently addressing in coming to these determinations.

This Court is satisfied that Mr. Marek did an impressively accurate and appropriate assessment of the economic damages and employed appropriate and substantiated economic principles to the determination he made with regard to the damages model used and the conclusions reached.

This declaration, which the Court adopts, provides an incredible counterpoint to Mr. Hayes' objection where, on the one hand, Mr. Marek has provided specific support for each of his conclusions, Mr. Hayes, as reflected in his written submissions as well as his oral presentation, provides unsupported, unsubstantiated information which the Court has no reasonable basis for adopting.

Specifically, there's no economic rationalization or basis for using the ten-day period for determining Marek's to Nice's February 8, 2001 disclosure that the company's

previously reported results would have been restated. Second, in attempting to use the 90-day post-referral vacation period to measure damages, there is a specific legal insufficiency in using that particular model. The PSLRA makes clear that damages can be diminished but not increased by reference to that 90-day period. Mr. Marek makes that clear in his declaration, and, hence, the $3.50 is an appropriate measure.

More important with regard to the overall objection, there's no reasonable basis, although there is articulated argument, there's no reasonable basis for this Court to adopt a $7 million ADS figure as opposed to 4,460,500 figure that Mr. Marek painstakingly discusses and then concludes as an appropriate number in his declaration.

Mr. Hayes, as noted earlier, argues that a new notice should be sent out because of the typographical error. Interestingly, I note that Mr. Hayes has not entered an objection with regard to plaintiffs' counsels' request for a 30 percent attorneys' fees and a request for reimbursement of expenses. His only objection substantively appears to be the disclosure of the estimated fee and the expense request as per ADS basis.

First, in the notice, the dollar amount per ADS was clearly a typographical error. Second, the material information noted that the percentage of the attorneys' fees would be 30 percent of the proposed $10 million settlement fund. All potential shareholders had the critical information they needed to determine whether they had information that would form a basis for an objection. And, as noted earlier, there were only two. This Court concludes that there is no need to send a new notice.

The third issue that plaintiff raises is that the Court should delay approval of the settlement until the claims administration process is complete. Again, there is no authority for this statement. Both plaintiffs and defendants in their submissions allude to the fact that Mr. Hayes cites to one case Biben versus Card, 789 F.Supp. 1001, a 1992 District of

Missouri case, as support for this proposition. Both plaintiffs and defendants note appropriately and accurately that Biben should give Mr. Hayes no solace on this point and here the settlement was negotiated at arm's length, as the Court has already found. The settlement has been fair and reasonable. There's no basis either by following Biben or any other reason that has been or could be articulated that would require the Court to determine that the approval of the settlement should be delayed until the claims administration process is complete.

The next objector is Mr. Weiderman. As I said, Mr. Fausto represented him here at the fairness hearing last week. The first argument made is that the — this is reading from the papers: This Honorable Court should not approve the settlement because the settlement is not nearly adequate and reasonable.

This Court has already come to the conclusion that the settlement is indeed fair, adequate and reasonable.

The objector Weiderman notes that the terms of the release of defendants is too broad.

While possibly a unique argument, it's not a particularly persuasive one. The terms of the release are similar to those used in similar types of cases. There's nothing in it that would lead the Court to conclude that the terms of release are other than fair and reasonable. And interestingly, he is the only objector among over 12,500 to have raised this particular objection, which the Court will note probably is because there's not any merit to that particular objection.

Mr. Weiderman also objected to the sufficiency of the information in the notice concerning damages.

The notice complied with the requirements of the PSLRA in all respects, including the statement as to damages. The notice as required by the PSLRA noted that there was a disagreement among the parties with regard to the average damages per ADS, and that was provided in the notice and that is referenced in the papers before me. So no confusion

resulted from that.

I've already noted that Mr. Weiderman withdrew his objection based on an objection to the conduct of counsel engaging in a fair negotiations process.

The last objection is that the attorneys' fees are unreasonable. The Court will address the reasonableness of the attorneys' fees, but it is clear to this Court, based on the analysis that will follow, that the 30 percent is a reasonable attorneys' fee and reflects a fair and reasonable attorneys' fees as well as the attendant expenses plaintiffs' counsel seeks to recover. So the Court finds no basis for that objection.

Now, with respect to the issue of attorneys' fees and expenses, lead plaintiffs' counsel requests an award of attorneys' fees of 30 percent of the settlement fund or $3 million in reimbursement of out-of-pocket expenses incurred in connection with the prosecution of this case, including expert consultant fees.

I recall that you submitted something to me, Mr. Gross, where the number is now 215, or thereabouts?

MR. GROSS: Yes, your Honor, the $215,588.63.

THE COURT: And forgive me, I don't remember the reason for the difference between the 205 number and the 215 number?

MR. GROSS: Mr. Marek's additional work in responding to the objection to settlement.

THE COURT: So the number we're addressing with regard to reimbursement of out-of-pocket expenses is $215,588.63.

I don't remember whether it was on the record or off the record, but the Court did address with counsel the issue of the competing calculations that a Court may apply in determining the appropriateness of a fee application. Those two competing methods of calculation are the percentage of recovery method and the lodestar method.

It would appear, based on Third Circuit precedent,

specifically Gunter versus Ridgewood, 223 P.3d 190, a Third Circuit 2000 case, that the application should be addressed pursuant to a reasonableness of a percentage fee award.

There are certain factors that should be considered before a fee award is granted under these circumstances. Those factors are the size of the fund created and the number of persons benefited, the presence or absence of substantial objections by members of the class to the fees requested by counsel, the skill and efficiency of the attorneys involved, the complexity and duration of litigation, the risk of nonpayment, the amount of time devoted to the case by plaintiffs' counsel and the awards in similar cases.

It has been proposed in the submissions to the Court that the 30 percent figure is indeed within the general realm of awards, and certainly examining the cases submitted to the courts, that is cases that have been determined at the district court level and then cases approved by the Third Circuit, that the range between 25 percent and 33 percent is certainly within the realm of similar awards in securities class actions with regard to the percentage of the attorneys' fees for lead plaintiffs' counsel, and the 30 percent award here certainly falls within that fair and reasonable range.

The Court analyzed in detail the following factors that are also part of the calculus, the time and labor involved, the experience, reputation, ability of counsel, the reaction of the class, as well as the fact — well, I didn't address the contingent fee issue. So let's deal with, first, time and labor involved.

It's clear this is a substantial and important case, that it addressed considerably complex issues, and that a substantial period of time was involved in the prosecution of this matter. Off the top of my head, I recall that the number is somewhere around 3,000 hours.

MR. GROSS: 3500, yes.

THE COURT: Thank you.

3500 hours of work, and certainly, given the complex-

ity of the issue, here that appears to be reasonable. The experience, reputation and ability of counsel, we don't want to say too much on the record for that it will puff them up too much, but certainly counsel on both sides of the aisle in this case are known to the Court and certainly have done a more than substantial and considerable job on behalf of their respective clients.

Lastly, the Court has noted, of over 12,500 potential class members, that only two filed objections. The Court has dispensed with each of the elements of those objections. So we are left with an overwhelmingly favorable reaction by the class to the reasonableness of the fees as well as the fairness and reasonableness of the overall settlement.

I do also note that plaintiffs' counsels' services were undertaken on a completely contingent fee basis on which, obviously, nothing was assured and considerable work was taken at a large degree of risk by counsel.

I also find that the request for reimbursement for expenses reasonably and actually incurred by plaintiffs' counsel is fair and reasonable, and I find no basis to reject the claim. Therefore, the request for reimbursement for 215,588.63 is granted.

Now, this is parenthetically. Parenthetically, I note, if the Court were to apply a lodestar method of analysis to the fee application, the Court would similarly approve the application for attorney's fees and expenses.

The hours expended on this matter, a little more than 3500, are reasonable in light of the complexity and circumstances of the litigation. We put into the record the number of hours as well as the complexity of the work completed. The hourly rates of the petitioners are reasonable and fall within the broad spectrum of permissible amounts.

Part of the argument put before me is that there are certainly public policy considerations that support the award of fees. The Court has already alluded to the contingent fee basis here. Also, the multiplier here is, I believe, 1.93, which,

given the case law in this area: In similar cases, is not an unreasonable multiplier at all, so I just note parenthetically that if that were the basis of the analysis, the Court would also approve the application.

Now, I also note that the, whatever, earlier in the opinion the Court alluded to the fact there was argument on the motion to dismiss. Clearly, there was not argument. Argument was scheduled, and as I recall, the parties and the Court had a conference call. There was a request that argument be postponed sine die because of the prospect of settlement.

Unless there are matters that anyone believes the Court has not addressed, I would merely then put a conclusion on the record.

MR. GROSS: No, your Honor, nothing further.

Thank you.

MR. KADET: Nothing at all. Judge.

THE COURT: Thank you.

In conclusion, the Court, as a result of the fairness hearing held and the submissions of the parties, believes that the settlement of $10 million should be approved. The plan of allocation should be approved. The objections are overruled of Mr. Weiderman and Mr. Hayes. The attorneys' fee application and the application for the reimbursement of expenses is also approved.

Well, thank you, all counsel.

MR. KADET: Before we adjourn, we have, your Honor, the appropriate executed judgment and then we can make copies?

THE COURT: Fine.

I'd appreciate if the transcript would be ordered so I can go over the opinion. I'll edit it and it will be filed.

MR. GROSS: Yes, we intended to.

(The Court stands adjourned.)

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE NICE SYSTEMS LTD.
SECURITIES LITIGATION

Master File No. 2: 0I-CV-737
(Judge Greenaway)

This Document Relates to:
ALL ACTIONS

[PROPOSED] ORDER

WHEREAS, the Court has considered all submissions made by the parties in connection with the Motion for Reconsideration of Settlement Approval and the Appeal Bond filed by Objector James J. Hayes;

IT IS HEREBY ORDERED, that Objector Hayes' motion for reconsideration of this Court's prior Orders (a) approving the class action settlement and (b) requiring Hayes to post a $10,000 bond pursuant to Fed. R. App. P. 7, is hereby DENIED.

/s/ JOSEPH A. GREBNAWAY, JR.
JOSEPH A. GREBNAWAY, JR.
UNITED STATES DISTRICT JUDGE

Dated: August 18, 2003

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 03-2262 and 03-3841

IN RE: NICE SYSTEMS, LTD
SECURITIES LITIGATION

JAMES J. HAYES,
Appellant

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civ. No. Ol-cv-00737)
District Judge: Honorable Joseph A. Greenaway, Jr.

Submitted Under Third Circuit LAR 34.1 (a)
February 4, 2004

Before: SLOVITER, NYGAARD and
CHERTOFF, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey. On consideration whereof, it is now hereby ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered April 8, 2003, be and the same is hereby AFFIRMED. Costs taxed against the appellant.

All of the above in accordance with the Opinion of this Court.

ATTEST:
/s/ MARCIO M. WALDRON
Clerk

DATED: February 9, 2004

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
Nos. 03-2262 and 03-3 841

IN RE: NICE SYSTEMS, LTD
SECURITIES LITIGATION

JAMES J. HAYES,
Appellant

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, and FISHER, Circuit Judges

The petition for rehearing filed by Appellant James J. Hayes in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en bane, the petition for rehearing is denied.

By the Court,
/s/ Dolores K. Sloviter
Circuit Judge

DATED: March 17, 2004

APPENDIX F

OFFICE OF THE CLERK - LEGAL DIVISION
UNITED STATES COURT OF APPEALS
21400 U.S. COURTHOUSE, 601 MARKET ST.
PHILADELPHIA, PA 19106-1790

February 19, 2004

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Re: In Re: Nice Systems, LTD. Securities Litigation
James J. Hayes, Appellant
C. A. No. 03-3841
(D. N. J. Civ. No. 0l-cv-00737)

To all Parties:

By order of the Clerk entered November 5, 2003, Appellees' "motion for expedited appeal, motion to dismiss the appeal at no. 03-3841 or in the alternative to consolidate with the

appeal at no. 03-2262 and to modify the briefing schedule" was sent to the merits panel. The parties were advised that no briefing schedule would issue in No. 03-3841 pending disposition of Appellees' motion by the merits panel. This will advise you that the above-referenced motion was construed as a motion to consolidate and was granted in the per curiam Opinion issued in this appeal on February 9, 2004. As the matter has been resolved and judgment entered on February 9, 2004, no briefing schedule shall issue in appeal No. 03-3841.

Very truly yours,
/s/ ELISABETH A. WALLACE
Staff Attorney

EAW/zm

APPENDIX G

FRIED FRANK: CLIENT MEMORANDA

MARCH 12, 1996

A PLAINTIFF WAIL: THE NEW ROLE OF INSTITUTIONAL INVESTORS UNDER THE SECURITIES LITIGATION REFORM ACT*

Notwithstanding its considerable impact on corporate disclosure practices and auditor-corporate relationships, a principal purpose of the Private Securities Litigation Reform Act of 1995[1] was to alleviate some of the more egregious abuses in securities class action lawsuits brought against issuers of public securities (and their affiliates).[2] Prior to last December, most of this litigation was controlled by plaintiffs' lawyers, who often raced to the courthouse following disappointing corporate announcements, or when optimistic predictions by corporate managers did not materialize exactly as prophesied. Since much of this litigation settled, and since critics have questioned whether the "merits" of an action had any relevance to the settlement value of the litigation,[3] these lawsuits were widely perceived as vehicles for coercing settlements of otherwise meritless lawsuits.[4]

Typically, institutional investors and their money managers avoided active participation in these lawsuits, for a variety of reasons.[5] The Act, however, changes the rules of the game, providing institutional shareholders and securities counsel with both new challenges and opportunities. Given the contours of the Act, it is not clear that institutional investors always will be able - or should want - to sit passively on the sidelines in battles between corporate issuers and shareholders. By the same token, corporate issuers can no longer afford to assume that their large institutional holders will (or will be able to) stay out of the fray of shareholder litigation.

In this article, we suggest some practical considerations for institutional investors and their money managers to consider in deciding how to respond to the new environment created by the Act.

The Way We Were

Prior to the Act's adoption, institutional investors routinely avoided assuming a leadership role in securities litigation. This was relatively easy to do because investors are not required to "opt in" to lawsuits in federal court, and few suits were instituted in state courts where an "opt in" process sometimes prevails.[6] Investors simply had to demonstrate class membership, and then collect checks, if money ever was forthcoming. Meanwhile, lawyers representing "professional" plaintiffs would race to the courthouse to file suit. These "professional" plaintiffs often received bounty payments in return for their willingness to serve as the named plaintiff in a shareholder class action, and did not adequately represent the other shareholders; in many cases, they did not even read the complaint.[7]

For institutional investors, the old system made taking an active role in class-action litigation procedurally difficult, economically impracticable, and "politically" unwise. As one institutional general counsel observed, there are several disincentives for institutional investors to participate in this system of redress:

[S]eldom do we get much detail about the claims filed or progress of settlement discussions until a deal has already been struck. If we want to object, we must retain separate counsel, opt out of a settlement and pursue a completely separate case or battle the company and class counsel in opposing a settlement. Given the relatively short time period in which decisions must be made, [institutional] plaintiffs are almost never in a position to risk challenging a settlement.[8]

Taking a passive role in litigation against portfolio companies allowed institutions to obtain some redress for their constituent shareholders, while remaining on good terms with the issuer.[9] This passivity often resulted in institutions, on

average, recovering less than 15% of their total court-certified losses in class actions, while bearing most of the costs associated with that litigation, at the same time that the plaintiffs' lawyers in these actions received 25-35% off the top of each recovery.[10]

Notes

[1] Pub. L. No. 104-67, 109 Stat. 737 (Dec. 22, 1995) (the "Act").

[2] See H.R. Rep. No. 369, 104th Cong., 1st Sess. 31-33 (1995) ("Conference Report").

[3] See, e.g., Janet C. Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 STAN. L. REV. 497, 511-13 (1991); Senate Comm. on Banking, Housing, and Urban Affairs, H.R. Doc. No. 98, 104th Cong., 1st Sess. (1995); Securities Litigation Reform: Hearings Before the House Subcomm. on Telecommunications and Finance of the Comm. on Energy and Commerce, 103d Cong., 2d Sess. 98 (1995) (testimony of John C. Coffee, Jr.).

[4] See, e.g., 141 Cong. Rec. S17943 (daily ed. Dec. 5, 1995) (statement of Sen. Bennett).

[5] The procedural obstacles to becoming involved were enormous. Investors often did not receive notice of a class action until a settlement had been reached, leaving them with few economically feasible options. See Letter from Kurt N. Schacht, General Counsel, SWIB, to Sen. Dominici (Sept. 27, 1993); Elliot J. Weiss & John S. Beckerman, Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions, 104 Yale L.J. 2053, 2098-2109 (1995) ("Institutional Investors") (stating that procedural obstacles including lack of timely notice, burdensome discovery regarding typicality and adequacy and lack of detail in settlement notices make it difficult for institutional investors to get involved in class actions). Institutional investors also "typically have a close relationship with public companies and investment bankers * * * [and] generally do not want to be perceived as hostile." Id. at 2111 n.271; accord John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 COLUM. L. REV. 1343, 1352 (1995) ("[I]n my view, institutional investors are likely to continue to prefer passivity (while allowing others to bring and maintain the class action) * * * because [they] wish to remain in contact with corporate management (to receive earnings forecasts and other 'soft' information), and some * * * are deeply conflicted about shareholder activism"); see also Randall Smith, Conference Calls to Big Investors Often Leave Little Guys Hung Up, WALL ST. J., Jun. 21, 1995, at C1 (conference calls are a standard way for companies to talk over "their quarterly earnings, their latest acquisition or some unfolding crisis with analysts and big investors," and companies take measures to restrict the access of hostile

investors to these informational calls); see also John C. Coffee, Jr., The SEC and the Institutional Investor: A Half-Time Report, 15 CARDOZO L. REV. 837, 845 (1994) (citing agency costs, the need for managers to focus on their fund's performance and the high costs of collective action as deterrents to greater involvement in corporate governance by institutional investors); cf. Robert Pozen, Institutional Investors: The Reluctant Activists, HARV. BUS. REV., Jan.-Feb. 1994, at 140.

[6] Shareholders may be required to opt in to class actions pending in some state courts. See, e.g., Robert A. Skirnick & Patricia I. Avery, The State Court Class Action - A Potpourri of Differences, 20 FORUM 750 (1985). Prior to 1966, F.R.C.P. Rule 25 also required would-be plaintiffs to "opt in" to class actions. In addition, certain statutes require plaintiffs to "opt in" to class actions. See, e.g., Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et. seq. (1988). These statutory "opt in" procedures have been criticized as providing less protection to potential plaintiffs, who must act promptly to "opt in" or be excluded from litigation and any settlement. See, e.g., Janet Bowermaster, State Class Action Procedures as an Alternative to the Opt In Class Action Provisions of the ADEA, 25 U. MICH. J. L. REF. 7 (1991).

[7] See, e.g., Conference Report, supra n.2, at 31-32; 141 Cong. Rec. S17966 (daily ed. Dec. 5, 1995) (statement of Sen. Hatch).

[8] Keith Johnson, Assistant General Counsel, SWIB, Securities Class Action Reform: A Real Client's Perspective, 1995 ABA Annual Meeting Section of Business Law ("A Real Client's Perspective"). In addition, institutional investors found it "difficult to determine how large one's claim is relative to total claims of the class. Consequently, institutions cannot readily determine what their stake really is in a class action until all claims are in and losses have been certified. This occurs long after the settlement has been approved." Id.

[9] See, e.g., John C. Coffee, Jr., Class Wars, supra n.5; cf. Randall Smith, supra n.5. Strong relationships are important to institutional investors, who generally want to know as much about their investments as possible and to encourage company management to take steps to enhance shareholder value. Concomitantly, issuers usually prefer that their largest shareholders remain pleased with the issuer's management and performance, and therefore, they endeavor to nurture good shareholder relationships. See generally Richard H. Koppes & Maureen L. Reilly, An Ounce of Prevention: Meeting the Fiduciary Duty to Monitor an Index Fund Through Relationship Investing, 20 IOWA J. CORP. L. 414 (1995); Karl A. Groskaufmanis, Proxy Reform and the Brave New World of Investor Relations: Ten Rules of Thumb for the 1990s, 7 INSIGHTS 18, 19-20 (Dec. 1993).

[10] See A Real Client's Perspective, supra n.8, at 1; Conference Report, supra n.2, at 34.

APPENDIX H

MOTLEY FOOL
DUELING FOOLS: SHAREHOLDER LAWSUITS

JUNE 10, 1998

SHAREHOLDER LAWSUIT'S BEAR'S DEN
by Bill Barker

I'm not entirely sure what we're dueling about here. Both shareholders and companies suffer under the current state of affairs in the securities class action field, and basically lawyers are the only ones who profit under the current system. Is Louis arguing that shareholders, on the whole, actually benefit from these strike suits? If so, sit right back and you'll hear a tale.

Securities class action suits are a potentially powerful tool to ensure that companies and management accurately convey to the marketplace the information necessary for investors to properly value stocks. There are countless examples of the proper and effective use of these suits. Unfortunately, because of the overwhelming and continuing misuse of the system, the only thing really evident when one of these suits is filed is that a stock price has plummeted and some lawyers feel that means they are entitled to a big chunk of money.

That is not my conclusion; it's Congress's. Following Congressional hearings leading up to the passage of the Private Securities Litigation Reform Act of 1995, the House and Senate Committees concluded that the securities class action suits were characterized by: 1) the routine filing of lawsuits whenever there was a significant change in a stock's price without regard to any underlying culpability of the company; 2) the targeting of deep pockets individuals; 3) the abuse of the discovery process to impose costs so burden-

some that it was simply more economical for the victimized company to settle; and 4) the manipulation by the class action lawyers of the clients they claimed they represented.

Excuse me, did somebody say clients? Class action lawyers don't have clients – at least not in their own minds. In an October 11, 1993, Forbes article entitled "I Have No Clients," William Lerach of the infamous Milberg Weiss securities class action law firm was quoted saying, "I have the greatest practice of law in the world. I have no clients."

What, after all, can you say about such a man that he hasn't just said about himself?

In 1997 hearings on whether the 1995 law was succeeding, Senator Christopher Dodd said, "[S]ome of the stories, were they not so tragic, would be downright humorous, where you had the computer-generated complaints... just one example after another of how the system had gone awry, to put it mildly."

One example of this long-running tragicomedy put on for our amusement and tears involves a case, In re: Pacific Securities Litigation, in which these fine, fine representatives of their clients' interests presented a $12 million negotiated settlement to the court for approval. Not bad you might say, but the problem was the lawyers determined that they should get $8 million of the award, and the plaintiffs, well, they should get $4 million – and be happy about it. When a lone shareholder opined that it seemed slightly unfair that the attorneys should get to keep 2/3 of the loot as a reward for negotiating a settlement that didn't approach the amount of money that was actually lost by the shareholders in the first place, the judge informed the lawyers that he would have an independent expert examine the worth of the proposed settlement. Rather than have its work looked over by an impartial party, the lawyers beat a hasty retreat, and, without comment, immediately dropped their fee request by $4 million.

That has been the continual problem. Attorneys operate under the assumption that they have no clients, are not being watched, and can pursue settlements with the sole intent of maximizing their fees, rather than to see any wrongs righted. This myopic cupidity comes at a price, and not at all just to the defendant companies. A 1990 study published in The Stanford Law Review concluded that there was essentially no correlation between the merits of a case and the amount of a settlement. The market seemed to have established a going settlement rate of about 25% of the amount claimed as losses by the plaintiffs, with lawyers pocketing about 1/3 of that recovery, regardless of whether anything improper had been done. Shareholders who actually had real cases were not receiving any more than those who did not.

The effect of this (aside from breeding further cynicism toward the legal system) is that directly or indirectly the investing public itself pays the price through higher premiums paid by all companies on the liability insurance that covers the settlement amounts. Over the long run, all of us shareholders are the ones paying the exorbitant legal fees.

The 1995 Reform Act (passed over President Clinton's veto) was, among other things, meant to change that by encouraging the participation in suits by large institutional investors as lead plaintiffs who could take control of the litigation away from the attorneys. It was presumed that institutional investors, particularly pension funds (because of their ultimate fiduciary duty to small shareholders), would best be able to balance the long-term interests of the company with the interests of the class in directing litigation.

As one court recently put it, "The best relief for the plaintiff class is not always the relief which would be sought by a 'professional plaintiff' or a plaintiff with a very small share in the defendant's company. As discussed above, lawyers for such plaintiffs have strong incentives to seek the maximum damage award possible without regard to future

company performance or share appreciation. Yet, overall return to the plaintiff class would, in some circumstances, be maximized through a less-than-maximum damage payment immediately and subsequent faster growth of company value. Though considering the long-term interests of defendant companies might in some circumstances reduce the immediate damage payments to the plaintiff class (and, consequently, the payment to plaintiffs' lawyers), it will also improve the chances that the company will experience future growth." 3:96-CV-1353-R CellStar Corp. Class Action Order.

Unfortunately, as you can imagine, the lawyers want no part of anybody balancing any interests, and at present, actively contest institutional leadership in the suits – and institutions are not stepping forward as a result. Until institutional investors shoulder the responsibility Congress set out for them, both shareholders and companies are going to continue to be plagued by attorney-driven litigation – and we are all going to continue paying the price.

No. 03-1676

Supreme Court, U.S.
FILED
JUL 20 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES J. HAYES,

Petitioner,

v.

NICE SYSTEMS, LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS NICE SYSTEMS LTD., BENJAMIN LEVIN AND AVRAHAM LAZAR

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Disturbing the decision below would require this Court to answer several questions in the affirmative, when each of those questions clearly merits a resounding "*no*":

1. Should a lone shareholders' activist be allowed to highjack a multi-million dollar settlement approved by 99.99% of the Class, in the hopes of rewriting the securities law into a system of "no-fault" insurance for investors?

2. Is a District Court required to absolutely calculate with scientific precision each individual shareholder's damages before approving the class-wide settlement of those claims?

3. Is it an abuse of discretion for a District Court to entertain a rebuttable presumption of fairness to a class action settlement reached at arms' length by experienced counsel after sufficient discovery has been conducted and where only a small fraction of the class objects?

4. Is it an abuse of discretion for a District Court, in evaluating the economics of a proposed settlement, to adopt the opinion of an economics expert over the unsupported speculation of a lone Objector who admits that he is not an expert?

5. Is it improper for a Court of Appeals to consolidate (i) the review of a District Court decision overruling objections to a class action settlement with (ii) the review of a motion for reconsideration of that same decision, where there was no "newly discovered evidence" presented to the District Court?

6. May a Petition for Certiorari present entirely new arguments and issues never raised in the Court of Appeals and the District Court?

COUNTER-STATEMENT OF THE PARTIES

1. Petitioner-Objector Hayes

Petitioner James J. Hayes is an NSL shareholder who objected in the District Court to the class action settlement.

2. Respondents-Plaintiffs

Respondents-Plaintiffs are those who were collectively named "Lead Plaintiffs" by the District Court: Afikim Management; Adrian Byrne; Dresdnerbank Investment Management; and E.H. Tepe Company, Inc.

3. Respondents-Defendants

Hayes lists in his Petition the following Respondents-Defendants:

NICE Systems Ltd.,
Nice Systems, Inc.,
Lauri A. Hanover,
Daphna Kedmi,
Avraham Lazar,
Benjamin Levin,
Haim Shani, and
Yuval Yanai.

However, four of those persons (presented immediately above in italics) are not proper Respondents as they were never before the Court of Appeals and, in fact, were voluntarily dismissed from the District Court proceedings long before the settlement was ever proposed or approved. Petitioner never below disputed the dismissal of those persons, and did not seek to name them as respondents before the Court of Appeals.

In addition, two persons, Mordechai Golan and David Ben-Zeev, appeared as appellees before the Court of Appeals but are not named as Respondents in the Petition.

CORPORATE DISCLOSURE STATEMENT

1. NICE Systems Ltd.

Respondent NICE Systems Ltd. ("NSL") hereby identifies the following parent corporations:

None.

Respondent NSL hereby identifies the following publicly-held companies that own 10% or more of NSL's stock:

None.

2. Nice Systems, Inc.

To the extent that Nice Systems, Inc. is deemed to be a Respondent herein, Nice Systems, Inc. hereby identifies the following parent corporations:

NICE Systems Ltd.

To the extent that Nice Systems, Inc. is deemed to be a Respondent herein, Nice Systems, Inc. hereby identifies the following publicly-held companies that own 10% or more of Nice Systems, Inc.'s stock:

NICE Systems Ltd.

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COUNTER-STATEMENT OF THE CASE

The Petition seeks review of the decision of the Court of Appeals for the Third Circuit which affirmed the District Court's approval of a $10 million class-action settlement. Notably absent from the Petition, or summarily swept aside, are several important points:

- the settlement was reached only after investigation and arm's-length negotiation by a cadre of experienced counsel, and overwhelmingly embraced by 99.99% of the Class;[1]

- before the fairness hearing, Petitioner and his counsel submitted written memoranda describing Petitioner's economic theories and arguments in great detail;

- at the fairness hearing, Petitioner appeared and was given sufficient time in which to expand upon his arguments;

- in approving the settlement, the District Court issued a well-reasoned and meticulously-supported opinion (the "District Court Decision") which clearly evinced an understanding of Petitioner's arguments;

- Petitioner's request for reargument of the District Court's Decision was denied because the "newly discovered evidence" was fully disclosed in the original class notice;

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[1] No class members asked to be excluded from the class (SA 315-16 (Gross Decl. ¶¶ 5-7); SA 374-75 (Tran. at 6:16-7:3)), and objections were interposed by only two shareholders – representing approximately one one-hundredth of one percent of the class (A 31-32 (District Court Decision at 12:12-13:11)).

- the Court of Appeals for the Third Circuit found no abuse of discretion and unanimously affirmed the District Court's fact-based fairness evaluation; and

- the Third Circuit subsequently found no grounds for reargument or rehearing *en banc*.

The Petition does not demonstrate that the Court of Appeals transgressed any Supreme Court decision or Constitutional mandate. Nor does the Petition reveal any disagreement among the Circuits regarding the controlling law. That is so because it is not a *legal* principle which truly undergirds the Petition. Instead, Petitioner argues that "it is in the nation's *economic* interest that this Court hear this appeal. . . ." (Pet. at 12) (emphasis added). As Petitioner describes it, "this Court has a unique opportunity to . . . benefit National wealth by improving the efficiency of the Nation's securities markets." (Pet. at 28).

In the District Court, Petitioner conceded that he is not a devotee of the rule of law currently applicable to securities class actions, but instead is a long-time shareholders' activist who wants to rewrite federal securities law into a system of "no-fault" insurance for public investors, in which no settlement providing for less than 100 cents on the dollar is ever acceptable – using those very words. (SA 400-402 (Tran. at 32:22-34:11)).[2]

And just as he unsuccessfully urged the District Court and the Court of Appeals, Petitioner suggests that this case presents this Court with a "wonderful opportunity" to rewrite the securities law to comport with Petitioner's dream of no-fault investors' insurance. (Pet. at 15). To achieve this end, Peti-

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[2] Citations herein to "SA __" refer to the Supplemental Appendix filed with the Court of Appeals on September 4, 2003. Citations to "A __" refer to the Appendix filed with the Court of Appeals on July 28, 2003.

tioner asks this Court to create a host of entirely new duties for District Judges in evaluating class action settlements, and to erect entirely new obstacles to the settlement of complex litigation.

Petitioner first argues that District Courts should be forced to abandon the customary practice of weighing the adequacy of a proposed settlement against estimates of aggregate damages allegedly suffered by the class. The claimed impetus for this sweeping reform is Petitioner's argument that certain methodologies currently used to estimate aggregate damages do not comport with the standards for the admission of scientific evidence under *Daubert* and its progeny.[3] But even if that were assumed to be true, it does not follow that methodologies which are inadequate as a means to calculate with scientific precision an award of damages at trial are somehow inappropriate in estimating aggregate damages to be weighed against a proposed settlement fund.

Of course, the determination at trial of securities damages is a complex inquiry usually giving rise to competing expert opinions and proofs. Forcing this exercise to be completed with scientific precision before any settlement could be judicially-approved would frustrate any possibility of early settlement – a result directly contrary to this Court's stated policies. For this very reason, virtually every Circuit commands that District Courts weigh the difficulty of calculating and proving damages as an essential element of examining the fairness and adequacy of a proposed settlement, exactly as was performed below. Requiring the scientific calculation of damages before a proposed settlement can be approved would excise this important test from existing law and practice.

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[3] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Moreover, it has always been the case that objectors to any proposed settlement have the opportunity to appear and challenge on any grounds the proffered estimates of aggregate damages. Indeed, Petitioner appeared in the District Court and challenged the damage estimates in this very case, and volunteered his own competing estimates and calculations of aggregate damages. It simply was the case that the District Court – and 99.99% of the rest of the Class – did not share Petitioner's contrary views and instead adopted Plaintiffs' expert's estimates. In this way, the process worked exactly as it should.

Petitioner next takes issue with the rebuttable presumption of fairness that the District Court applied in evaluating this settlement. Because that presumption stood upon a firm foundation in controlling precedent, Petitioner cannot argue that the presumption was invalid from the outset. Instead, Petitioner argues that the presumption should be effective only during the preliminary approval given to a proposed settlement, when a settlement class is provisionally certified, and then *must* fall away when the final evaluation of the settlement is undertaken. Continuing to embrace such a presumption during final evaluation, Petitioner argues, mandates that every settlement – even bad ones – will be judicially approved.

Petitioner apparently misunderstands the difference between a rebuttable and an absolute presumption. The presumption applied by the District Court was a rebuttable presumption, exactly as the Third Circuit has directed in the very authorities upon which Petitioner relies. The District Court simply found that Petitioner's admittedly non-expert opinions and speculation did not warrant rejection of the settlement, and the Third Circuit saw no reason to disturb that factual finding.

Petitioner's next grievance is that it was error for the District Court to reject Petitioner's competing economic theory about the "Efficient Market Hypothesis" and his modeling of the proposed settlement, and it equally was error for the Court

of Appeals to not "correct" this. But Petitioner did not present any competent expert testimony to the District Court in support of his position. Instead, Petitioner merely recited – exactly as he does in the Petition – his subjective belief about economic theories, all the while admitting that he is not an expert in the field. It certainly was not an abuse of discretion for the District Court to accept Plaintiffs' proffered expert testimony over the lay opinion of Petitioner on such a technical issue. And it was not error for the Court of Appeals to decline to disturb this inherently fact-based determination.

As to the remaining elements of the Petition, Petitioner failed to raise those arguments below. As such, it respectfully is submitted that they too provide no basis for the issuance of a writ.[4]

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[4] The Petition contains many misstatements of the record and about the underlying facts of this litigation. For the sake of brevity, this response addresses only those matters which are necessary for the evaluation of the Petition.

ARGUMENT

I. PROSCRIBING AGGREGATE DAMAGE ESTIMATES WOULD NEEDLESSLY FRUSTRATE SETTLEMENTS AND PROVIDES NO BASIS FOR A WRIT.

Petitioner asserts that aggregate damage calculations are not reliable enough to pass muster under *Daubert*,[5] and therefore may not be used in evaluating the fairness of class action settlements. Petitioner relies for this proposition solely upon the opinion in *Kaufman v. Motorola, Inc.*, No. 95 C 1069, 2000 WL 1506892 (N.D. Ill. Sept. 21, 2000), where the District Court for the Northern District of Illinois determined that aggregate damage estimations using the Proportional Trading Model ("PTM") are inadmissible under Federal Rule of Evidence 702 and *Daubert*, and thus could not be used to prove actual damages at trial. The *Kaufman* Court therefore granted a motion in limine to preclude testimony to the jury concerning aggregate damages estimated through that trading model.

But the ultimate determination of "actual damages" to be awarded after trial is simply not a prerequisite to finding a settlement fair and adequate. In determining the fairness of a proposed settlement, the trial court is not to conduct a trial, nor to finally determine any issues going to the merits of the claims:

> It cannot be overemphasized that neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute.

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[5] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977) (quoted in *In re Cendant Corp. Litig.*, 264 F.3d 286, 301 (3d Cir. 2001)).[6]

Thus, rather than calculating "*actual damages*," as is required in a full trial of a securities claim,[7] a proposed settlement is to be weighed against only the "*likely rewards*" of trial.[8]

> [C]ases in which courts have approved settlements based upon aggregated damages . . . are distinguishable [from cases where aggregate damage calculations may not be presented to the jury] because settlements are evaluated under a different set of considerations. *See In re Cendant Corp. Litigation,* 264 F.3d 201, 231-32 (3d Cir. 2001) (listing nine *Girsh* factors for determining whether a proposed class-action settlement is fair, reasonable and adequate). Indeed, one of the *Girsh* factors is the risk of establishing damages at trial.

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[6] *See also Girsh v. Jepson*, 521 F.2d 153, 160 (3d Cir. 1975) ("[W]e [do not] suggest that a record appropriate to a trial on the merits is required. We recognize that the task of the district court is to determine whether the proposed settlement should be accepted and approved – a determination substantially different than a decision on the merits.").

[7] Only "actual damages" may be awarded at trial under Rule 10b-5. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 155 (1972); *Rowe v. Maremont Corp.*, 850 F.2d 1226, 1240 (7th Cir.1988); Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a).

[8] *See, e.g., Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968) ("compare the terms of the compromise with the *likely* rewards of litigation") (emphasis added); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 782 (3d Cir.1995) ("settlement [requires] inquiry into the terms of the settlement relative to the *likely* rewards of litigation") (emphasis added) ("*G.M. Pickup*").

Bell v. Fore Systems, Inc., No. Civ.A. 97-1265, 2002 WL 32097540 at *4 (W.D. Pa. Aug. 2, 2002).

If Petitioner were correct, then virtually every decision approving a securities class action settlement in recent years was error, because they each have relied upon aggregate damage calculations in weighing the fairness of the settlement:

> Lead Plaintiffs . . . recognize that the trading model used to estimate damaged shares is just that – a model: "Because this is a model, it will not replicate specific actual trades, like the [objector's] stock sales; indeed the model may overstate activity on some days during the Class Period, and understate activity on other days." [Lead Plaintiffs] go on to assert that "trading models are accepted as providing reasonably accurate predictions of trading activity over a period of time and are customarily used to estimate trading activity for the purposes of calculating damages in securities fraud cases.". . .
>
> The Court agrees with Lead Plaintiffs. The use of trading models is accepted to create an estimate of aggregate damages. The [objectors] have given no other reason to disregard [Lead Plaintiffs' damage expert's] conclusion other than it is based on a model. Their objection is rejected.

In re Cendant Corp. Sec. Litig., 109 F. Supp.2d 235, 272 (D.N.J. 2000) (citations omitted), *aff'd*, 264 F.3d 201 (3d Cir. 2002); *see also In re Aetna Inc. Sec. Litig.*, No. CIV. A. MDL 1219, 2001 WL 20928 at *10 (E.D. Pa. Jan. 4, 2001) (approving settlement despite a "wide disparity in damage assessments" by

economic experts who "would likely have been challenged on *Daubert* or other grounds" at trial).[9]

The determination of "actual damages" in securities class actions is a complex inquiry usually giving rise to competing expert opinions and proofs. Needlessly forcing this exercise to be completed with scientific precision before any settlement could be judicially approved would frustrate any possibility of early settlement – a result directly contrary to this Court's stated policies.

II. APPLICATION OF THE REBUTTABLE PRESUMPTION OF FAIRNESS PROVIDES NO BASIS FOR A WRIT.

Of course, the judicially-favored efficiencies of early compromise would certainly be frustrated if, in order to approve a class-wide settlement, the District Court were forced to conduct a full trial on the merits. Therefore, courts initially examine the process by which a settlement was reached:

> a judge cannot really make a substantive judgment on the issues in the case without conducting some sort of trial on the merits, exactly what the settlement is intended to avoid. Instead, the court determines whether negotiations were conducted at arms' length by experienced counsel after adequate discovery, in which case there is a presumption that the results of the

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[9] Another, more practical, problem for Petitioner is that *he* proffered aggregate damage calculations to the District Court, and specifically conceded that *he* was using the very same PTM that was rejected at trial in *Kaufman*. *See* SA 354 (Hayes Mar. 28 Reply at 1) ("[T]he number of ADSs eligible for the settlement using the proportional trading model ('PTM') would be equal to the float of 7,000,000 ADSs."). Thus, Petitioner advocates for the invocation of a rule with which even he could not comply.

process adequately vindicate the interests of the absentees.

G.M. Pick-Up, 55 F.3d at 796-97.

The Third Circuit has therefore provided guidance to its District Courts, through the establishment of an initial presumption of fairness where four criteria are met:

> Before sending notice of the settlement to the class, the court will usually approve the settlement preliminarily. This preliminary determination establishes an initial presumption of fairness when the court finds that: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.

G.M. Pick-Up, 55 F.3d at 785; *accord In re Cendant*, 264 F.3d at 233 n.18.

The District Court made exactly these four findings, and therefore properly concluded that a presumption of fairness was warranted.[10] Notably, Petitioner did not below – nor in the

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[10] *See* A 31 (Decision at 12:16-25) ("[T]he approval of the class action appears to be somewhere between 99.98 and 99.99 percent of the Class. . . . [C]ertainly . . . the Class has overwhelmingly approved of the proposed settlement."); A 32-33 (Decision at 13:24-14:12) ("Here, lead plaintiffs' counsel had conducted an extensive investigation, including consulting with damage and accounting experts, analyzing the facts and circumstances of the defendants' conduct and the damages suffered by the Class. . . . As noted earlier, plaintiffs conducted due diligence, confirmatory discovery, reviewed critical documents and did depose Nice's current C.F.O. Through these efforts it is clear to this Court that plaintiffs' counsel had put itself in a position to discern the critical facts, to understand the interplay between those facts and the attendant law within the Third Circuit and to come to a reasonable determination that attempting to resolve this case short of an (continued...)

Petition – utter a single word which might undermine the four bases for that presumption.

Instead, Petitioner now argues that the presumption should be effective only during the preliminary approval given to a proposed settlement, when a settlement class is provisionally certified, and then *must* fall away when the final evaluation of the settlement is undertaken. Continuing to embrace such a presumption during final evaluation, Petitioner argues, mandates that every settlement – even bad ones – will be judicially approved.[11]

Petitioner simply misunderstands that the presumption of fairness is not absolute, but instead is rebuttable. The Third Circuit has repeatedly made this clear when, immediately after noting that a District Court has properly applied the presumption, it nonetheless evaluated whether the District Court properly applied the traditional nine factors which still have to be satisfied for final approval. *E.g.*, *In re Cendant*, 264 F.3d at 233 n.18 & 232-33. Indeed, in one of the Third Circuit cases upon which Petitioner places his greatest weight, the Court specifically cautioned that the initial presumption of fairness could be rebutted upon a proper showing:

> the possibility of rebuttal of the presumption of reasonableness must be seriously considered by the District Court. . . .

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[10] (...continued)
agonizingly long litigation process was in the best interest of the Class."); A 28 (Decision at 9:12-17) ("I note as an initial matter that it is apparent to me, based on the papers that have been submitted, that this settlement is the product of an arms'-length negotiation. Needless to say, counsel appearing on both sides in this matter are extremely able. . . .").

[11] *See* Petition at 21 (the law "require[d] the District Court to abandon its initial presumption of fairness in its final fairness deliberations").

In re Cendant, 264 F.3d at 285.

The District Court well understood this mechanism, as – even after finding the presumption was properly applied – it nonetheless embarked upon the painstaking review of the nine traditional factors set forth in *Girsh v. Jepson*, 521 F.2d 153, 156-57 (3d Cir. 1975), and carefully weighed the proposed settlement against each of them *seriatim*. (A 29-40 (Decision at 10-21)). In conclusion, the District Court found that:

> the Court, as a result of the fairness hearing held and the submissions of the parties, believes that the settlement of $10 million should be approved.

(A 55 (Decision at 36:5-7)). A final judgment of dismissal was then entered by the District Court. (SA 426-30 (Final Judgment)).

Thus, the District Court merely found that Petitioner's supposition and unsubstantiated economic theories did not warrant rejection of the settlement, and the Court of Appeals saw no reason to disturb that inherently fact-based finding.[12]

III. PETITIONER'S EFFORTS TO PRESENT EXPERT OPINION ABOUT THE EFFICIENT MARKET HYPOTHESIS PROVIDE NO BASIS FOR A WRIT.

Petitioner asserts that it was error for the District Court to reject his competing economic theories about the "Efficient Market Hypothesis" and Petitioner's modeling of the proposed settlement, and it equally was error for the Court of Appeals to

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[12] The Third Circuit has stated that a District Court's "findings required by the *Girsh* test are factual, which will be upheld unless they are clearly erroneous." *In re G.M. Pickup*, 55 F.3d at 786.

fail to disturb this factual finding.[13] Just as he did below, Petitioner fills his papers with page upon page of economic theories, speculative calculations about how quickly the trading price of NSL securities should have been impacted by adverse news, and guesstimates over how many "damaged shares" were traded during the Class Period. (Pet. at 6 & n.6, 16-19).[14] But, in addition to the utter lack of support for his many assumptions,[15] Petitioner admitted below that he is not an economist, that his only degree is in geology, and that his only qualifications for advancing his alternative economic theories and calculations are his interests as a shareholders' advocate. (SA 399, 398, 400-01 & 406 (Tran. at 31:4-9, 30:19-25, 32:18-33:5 & 38:16)).

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[13] In Petitioner's own words: "The courts below misunderstood the arguments on economic theory. . . ." (Pet. at 18).

[14] Nor has Petitioner even been consistent in his opinions. Before this Court, Petitioner opines that the adverse news must have been fully digested by the market and reflected in the trading price in only one day (Pet. at 17-18), while in the Court of Appeals he cited authority for the proposition that such adverse news may not have been fully reflected in the trading price until the passage of two trading days (Appellant's Response to Plaintiffs/Appellees' Second Amended Motion to Expand the Record, at 3 (Sept. 20, 2003) ("For negative earnings surprises, for example, the article reported that a stock price drop that 'took three to four weeks in the 1980's, it now occurs within two days.'")).

[15] Petitioner did not analyze institutional holdings which did not trade, and provided absolutely no support for his assumptions that there were 7 million ADSs outstanding and that every one of those 7 million ADSs traded during the Class Period and were held on February 8 – rendering them eligible to share in the settlement. (SA 354-60 (Hayes Mar. 28 Reply)). Nor did Petitioner provide support for his assumption that the per share inflation was $5.20. (SA 354-60 (Hayes Mar. 28 Reply)). Instead, Petitioner mechanically used the drop in price in the single day after the February 8 announcement, without performing an event study showing the huge recovery of that trading price in the immediately following days. *Id.*

In contrast, the Plaintiffs' economic expert, Mr. Marek, possessed a curriculum vitae which included formal education in economics, and research and testimonial experience directly addressed to securities litigation. The District Court learned that Mr. Marek had performed an analysis of institutional holdings and transactions in NSL ADSs to determine how many were traded during, and held through the close of, the Class Period. (SA 235-38 (Marek Decl. ¶¶ 10-14)). Through an event study, Mr. Marek also determined the impact on the trading price of the ADSs following the February 8 curative disclosure, and calculated the maximum per-share damage attributable to the alleged fraud. (SA 238-43 (Marek Decl. ¶¶ 15-25)). Thus, opined Mr. Marek, the aggregate damages to the Class were no more than approximately $15 million. (SA 243-50 (Marek Decl. ¶¶ 26-41)).

Given the dichotomy in qualifications and depth of analysis, the District Court had little trouble accepting the "conservative" opinions of Plaintiffs' damages expert over the baseless "supposition" of Petitioner Hayes:

> During the Court's colloquy with Mr. Hayes, the Court inquired, number one, of Mr. Hayes's qualifications to challenge Mr. Marek's declaration which made several assumptions leading to the damages calculations. Also, the Court inquired of Mr. Hayes whether there was any logical basis or economic theoretical basis for the Court to, essentially, reject Mr. Marek's proposal in favor of what Mr. Hayes suggested.
>
> . . . There was nothing about [Petitioner's] oral presentation or the presentation in his papers which would lead this Court to conclude that he has the ability to satisfy the Court that the conclusions that he has reached are other than conclusory assertions based on supposition and not credible economic theories that the

> Court should substitute rather than adopting Mr. Marek's assumptions and conclusions.
>
> . . . .
>
> Mr. Hayes, much to the chagrin of the Court, was unable to articulate a basis for the Court to adopt his alternate theory both with regard to the number of eligible ADSs and with regard to the $3.50 of potential damage per ADS.
>
> . . . .
>
> While as a theoretical and academic matter the colloquy was interesting, it certainly provided no basis for the Court to challenge the conclusions of Mr. Marek. Mr. Marek's declaration is impressive both in its calculations but, frankly, in the conservative manner in which he addressed the issues and came to his conclusions.
>
> I do note, more importantly, that the Court notes that Mr. Marek is a person who is eminently qualified to render the opinions that he has with regard to the settlement. . . .
>
> . . . .
>
> In other words, his specific area of expertise is exactly what is required in attempting to analyze the fairness and reasonableness of the settlement that the Court must do here.

(A 42-46 (Decision at 23:21-24:14, 24:22-25:8, 25:16-27:7)).

It certainly was not an abuse of discretion for the District Court to give greater weight to the analysis and opinions of Plaintiffs' economic expert. And it just as assuredly was not error for the Court of Appeals to fail to disturb this factual finding. This branch of the Petition therefore supplies no reason for a Writ to issue.

IV. THE THIRD CIRCUIT'S CONSOLIDATION ORDER WAS NOT A DENIAL OF DUE PROCESS AND PROVIDES NO BASIS FOR A WRIT.

Although the point heading in the Petition seems to take issue with the District Court's denial of his Rule 60 motion for reconsideration, Petitioner's arguments instead all point to the Third Circuit's decision to consolidate the appeal of that decision with the primary appeal from the underlying decision approving the settlement. (Pet. at 26-27). Petitioner claims that this consolidation was a denial of due process, because the Third Circuit supposedly did not give Petitioner an opportunity to state his "issues and arguments." (Pet. at v, 9, 27). But the notion that the Third Circuit did not know Petitioner's "issues and arguments" is utterly baseless. Petitioner was afforded a full and fair – indeed, generous – opportunity to be heard.

Petitioner was first granted additional time to serve and file his opening appellate brief. Then, the Court of Appeals granted Petitioner's motion to file a reply brief which exceeded the page limits of the Third Circuit. That reply brief specifically referenced Petitioner's "companion" appeal, *i.e.*, from the motion for reconsideration. (Reply Brief for Appellant, at 25-26 n.6 (Sept. 29, 2003)).

One week later, Petitioner filed papers with the Third Circuit in which he again described his arguments with respect to the appeal from the denial of reargument. (Appellant's Opposition to Plaintiffs/Appellees' Motion for Expedited Appeal, at 1-3 (Oct. 5, 2003)). One additional week later, Petitioner again filed papers before the Court of Appeals which further described the supposed "newly discovered evidence" supporting his request for reconsideration by the District Court, and the appeal from the denial of that request. (Appellant's Response That Notice of Appeal is Not Timely, at 2 (Oct. 15, 2003)).

Then, Lead Plaintiffs filed with the Third Circuit responsive papers which demonstrated that the "newly discovered evidence" was *not* newly discovered but, instead, was disclosed in the original class notice. (Plaintiffs'/Appellees' Response to Appellants' Jurisdictional Defect, at 2-4 (Oct. 21, 2003)). Importantly, that submission to the Third Circuit included the full transcript of the August 18 argument before the District Court on Petitioner's motion for reconsideration, in which Petitioner participated and presented all of his arguments urging reargument.[16]

Petitioner subsequently filed a letter with the Court of Appeals, again explaining the bases for his motion for reconsideration and his appeal from the denial thereof. (Letter from J. Hayes to Third Circuit (Jan. 15, 2004)). And, notably, Petitioner therein specifically joined in Respondents-Plaintiffs' request that the two appeals be consolidated. *Id.*[17]

Finally, Petitioner's request for *en banc* rehearing before the Third Circuit specifically argued about the supposed lack of formal briefing on the "second appeal," and yet again set forth therein the very arguments which Petitioner now asserts he was denied the opportunity to present to the Third Circuit. Indeed, Petitioner's submission was so swollen with argument that Petitioner again exceeded the page limits under the rules of the Court of Appeals. (Petition for En Banc and Panel Rehearing, esp. at 2-3, 16-17 (Feb. 22, 2004)).

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[16] In his Petition for En Banc and Panel Rehearing, Petitioner specifically conceded that this transcript and the corresponding arguments were provided to the Court of Appeals on October 21, 2003. (Petition for En Banc and Panel Rehearing, at 16 n.6).

[17] Petitioner stated: "The Appellant supports Plaintiffs/Appellees' desire for prompt scheduling of a briefing schedule for the second appeal and that the two appeals are consolidated for panel consideration." (Letter from J. Hayes to Third Circuit, at 1 (Jan. 15, 2004)).

Thus, the argument that Petitioner was somehow denied the opportunity to be heard is without merit.

V. PETITIONER'S REMAINING ARGUMENTS WERE NOT PRESENTED BELOW.

A. Petitioner Has Never Before Taken Issue With the District Court's Consolidation Order.

Petitioner asserts that "The District Court's first mistake was its June 22, 2001, Order that consolidated fifteen individual suits and simultaneously appointed the lead plaintiffs and class counsel." (Pet. at 22). Petitioner never made any such argument below. (Indeed, Petitioner never sought to be heard during argument and determination of the consolidation motion and the various motions to be named lead plaintiff – despite the public notices which were issued under the Private Securities Litigation Reform Act of 1995 ("PSLRA") inviting interested parties to be heard.)[18] For those reasons alone, Petitioner has waived any right to review in this Court. Moreover, Petitioner's new arguments are baseless.

Petitioner claims two grounds for relief. First, Petitioner argues that the PSLRA requires that the cases be consolidated before the lead plaintiff is named, 15 U.S.C. 78u-4(a)(3)(B),[19] while in this case those two determinations were announced by the District Court in the same written Order (Pet. at 3-4). However, that written Order reveals that the consolidation decision *was* reached first, exactly as the PSLRA requires.

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[18] The PSLRA requires public notice to be given upon the filing of the very first action, describing the process for determination of lead plaintiff. *See* 15 U.S.C. 78u-4(a)(3)(A) & (B).

[19] Petitioner erroneously cites this provision as "15 U.S.C. 78u4(3)(B)(ii)." (Pet. at 4).

(SA 1-11 (Order dated May 21, 2001)). And there is no proscription against announcing those two decisions in the same written order. To the contrary, the PSLRA requires the lead plaintiff determination to be made "as soon as practicable" after consolidation is granted. 15 U.S.C. 78u-4(a)(3)(B). Thus, far from demonstrating any error, the District Court's Order reveals scrupulous attention to the statute and an enviable alacrity of decision.

Secondly, Petitioner argues that, because the consolidated complaint was not filed until after the lead plaintiffs were named, the court could not adequately adjudge whether the lead plaintiff candidates' claims were typical of the class's. (Pet. at 3-4). Petitioner asserts that the consolidated complaint should instead be filed before any lead plaintiff is named. Petitioner does not point to any statute or decisional law to support this argument, probably because such a scheme would be directly contrary to the provisions of the PSLRA previously cited. And, of course, Petitioner's innovation would present a practical problem. Who would be allowed to interpose the consolidated complaint, if they were not yet named lead plaintiff? And because only lead plaintiff can select lead counsel, who would file it for them? Petitioner says nothing to resolve these obvious obstacles to accepting his position.

B. Petitioner Has Never Before Taken Issue With the Cover Page of the Class Notice.

For the first time, Petitioner now argues that certain disclosures about counsel fees found in the body of the class notice should also have been summarized on the cover of that notice. (Pet. at 5-6). This argument was never raised below, and is therefore waived.

Moreover, Petitioner cannot assert that he did not read the disclosures about counsel fees within the body of the notice, as his written objections to the District Court argued quite

extensively about those very disclosures. (A-47-48 (Decision at 28:24-29:6)). Over those objections, the District Court found that the class notice was sufficient to place class members on notice of the terms of the proposed settlement:

> I also note, parenthetically, that the notices that were sent out met all of the requirements of the law. . . .
>
> So it's clear to the Court that class members had an opportunity, if they so chose, to voice any objections if that was their desire.
>
> . . . .
>
> This Court concludes that there is no need to send a new notice.

(A-32 (Decision at 13:1-9); A-48 (Decision at 29:14-15)).

* * *

In claiming that the $10 million settlement was not a fair and reasonable outcome, Petitioner stands alone against the other 99.99 percent of the Class, the unanimous Panel of the Third Circuit, the District Court and controlling precedent. The reason for that stark disparity is clear. Rather than embracing a system in which the settlement of complex litigation is favored, Petitioner hopes to supplant it with a system of no-fault insurance for investors in which only 100 cents on the dollar is ever acceptable:

> [Petitioner Hayes]: . . . It's not in the economic interest of shareholders to accept a settlement less than 100 percent of their damages. . . . I think securities litigation should at some point become like an automobile accident. . . . [T]he insurance company is going to come out and pay you a hundred percent of the estimated damages.

(SA 400-02 (Tran. at 32:22-34:11, *esp.* 33:16-34:6)).

But efforts to command such sweeping reform should instead be directed to Congress – and certainly provide no justification for the issuance of a Writ of Certiorari to the Court of Appeals for the Third Circuit.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should not issue.

Dated: July 22, 2004

Respectfully submitted,

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